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United Typothetae of America. Secretary's office

THE UNION LABEL

Its requirements upon public printing illegal as class legislation, and, therefore, unconstitutional

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FOLLOWING are some of the opinions and references given in union label cases where ordinances and petitions for ordinances requiring the label on public printing have been contested.

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OPINION OF THE SUPREME COURT

In the case of Marshall & Bruce Company *vs.* City of Nashville, deciding that an ordinance requiring the Union Label on public printing is "contrary to public policy, the Charter of the City, and to the Constitution of the State."

MARSHALL & BRUCE COMPANY
vs.
CITY OF NASHVILLE.

Equity Docket—Davidson County.

This is a bill against the Mayor and City Council of Nashville to recover $83.05 and interest for stationery furnished and printed for the city. The city concedes that the account is correct as to items and amounts, but declines to receive the goods and pay the bill therefor on the ground that the stationery does not bear the union label of the Nashville Allied Trades Council or the label enacted by the International Typographical Union.

It appears that on December 11, 1897, the City Council of Nashville passed the following ordinance:

Section 1. Be it enacted, That all city printing shall bear the union label of the Nashville Allied Trades Council or the label enacted by the International Typographical Union.

Section 2. That this ordinance shall take effect from and after its passage, the welfare of the city requiring it.

It appears further that in February, 1901, the city, being in need of blank books and stationery to the value of over fifty dollars, solicited competitive bids therefor, specifying what was desired, and complainant being the lowest bidder was awarded the contract to furnish the goods, and under its bid and contract manufactured the articles specified according to specifications and delivered some of the letter-heads embraced in the order in March, 1901.

After the manufacture of all the items specified and the advance delivery of the letter-heads mentioned, the city notified

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complainant that it would refuse to receive the goods upon the sole and only ground that they did not bear the union label prescribed by the ordinance and refused to pay for the goods for the same reason, and thereupon relet the work to the Brandon Printing Company at an advance price of 38½ per cent. The bill is filed to recover the amount of complainants' bill and to have the ordinance in question declared unreasonable, null, and void.

The city insists upon the validity of the ordinance and that complainants knew of its existence when they made their bid and agreed to abide by it in the event the contract was awarded to them, and upon both grounds denies any right of recovery.

The Chancellor heard the case on proof and held the ordinance null and void because in conflict with the provisions of the charter of the city and gave complainants judgment for the amount of the bill and costs.

The city appealed and in the Court of Chancery Appeals assigned two errors:

First—That the Chancellor erred in holding the ordinance void and that it was not in the power of the city to pass the same.

Second—That even if the ordinance be held void the complainant nevertheless agreed to place the union label upon the stationery and was bound by its agreement and unless complied with it could not recover.

The charter of the city requires that all goods and supplies furnished the city amounting to over fifty dollars must be let out at competitive biddings to the lowest responsble bidder.

We are of opinion that the ordinance in question is clearly in conflict with the spirit, purpose and letter of the charter and is invalid and void.

It is moreover class legislation, contrary to public policy, and to the Constitution of the State, because plainly discriminative in its character. All the authorities to which we have access so hold in regard to similar ordinances and statutes, and we have been able to find none to the contrary. We cite the following from among many others:

Davenport *vs.* Walker, 68 N. Y. Sup. 161; Holden *vs.* City of Alton, Ill., 53 N. W. Rep. 556; City of Atlanta *vs.* Steiu, 36 S. E. Rep. 932; Adams *vs.* Brennan, 42 N. E. L. R. A. 718;

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Fiske *vs.* The People, 58 N. E. Rep. 985; State *vs.* Loomis, 115 Mo. 307; *In Re* Jacobs, 92 N. Y. 98; People *vs.* Gibson, 100 N. Y. 389.

We give a short synopsis of several cases to illustrate the holdings.

Holden *vs.* City of Alton, Ill., April 17, 1899, 53 N. W. Rep. 556.—The charter of the city of Alton provided that all printing and contracts for stationery should be let to the "lowest bidder" unless the amount of the contract price was under ten dollars. Charles Holden proposed at a competitive bidding under seal to print certain bonds for the city for $18.25. The Sentinel-Democrat Printing Company bid $22.85 for the same work. An ordinance was pending before the Council, but had not become a law, to the effect that no city printing should be let to anyone who could not furnish the union label. Mr. Holden could not, but the Sentinel-Democrat Publishing Company could. The letting of the contract was delayed until the ordinance could be passed. This being done, the contract was let to the Sentinel-Democrat Printing Company and the bid of Holden refused solely and alone on the ground that he could not show the union label. Holden was a stationer of good standing, entirely responsible, and a taxpayer of the city. He filed a bill to enjoin the Sentinel-Democrat Publishing Company from carrying out the contract and the city from paying him therefor. Nothing had been done in that direction when the bill was filed, but pending the final decision the city paid him anyway.

The Court held that the fact that Holden was a bidder did not impair his right to bring the bill as a taxpayer. The Court further said that even if the ordinance had been approved before the bidding the case would not have been altered; that the statute or charter required the contract to be let to the lowest bidder, and that this "*implied* equal opportunity and freedom in all who might choose to bid." The Court said that while in many cases there might be ground for the exercise of discretion, here, there was no attempt to exercise any discretion as to the qualification or facilities of bidders, and that a refusal upon the ground upon which Holden was refused was "merely the imposition of a greater burden on the taxpayers through an attempted abuse of power." As the money was paid after the bill had been filed, restitution to the city was directed.

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City of Atlanta *vs.* Stein, Georgia, August 9, 1900, 36 S. E. Rep. 932.—The charter of Atlanta does not require the public printing to be let to the lowest responsible bidder, but leaves to the municipal authorities a wide discretion.

An ordinance was passed by the city requiring all "printing used by the city to bear the union label, and directing all advertisements soliciting bids to so state." Printing was advertised for, it being stated that no bids could be accepted for printing which could not bear the union label. There were four union and fifteen non-union printing establishments in Atlanta at that time. The non-union men were not allowed to bid, and evidence was introduced tending to show that they could have bid less than the lowest union bid.

The work was awarded to the Pease Printing Company, a union establishment. Thereupon Mr. Stein filed a bill, as a citizen and taxpayer, to enjoin the execution of this contract. The injunction was granted upon the ground that the *ordinance was void because it tended to defeat competition and encourage monopoly.* The Court said that it was "not within the power of municipal authorities to enact legislation of this kind." *This ordinance cut off the power to fully and freely exercise the discretion which the public good required to be exercised; and it was therefore void.* The injunction was granted.

Adams *vs.* Brennan, 177 Ill. 194, 42 L. R. A. 718.—The Board of Education in Chicago entered into an agreement with a workingman's union, known as the Building Trades' Council, to the effect that the Board would insert in all contracts for work on school buildings a provision that union men only should be employed by contractors to work on such buildings.

A schoolhouse needing repair, the Board advertised for bids, inserting in the advertisement a clause to the effect that none but union labor should be employed. One Knisely put in two bids. One was for $1,900, with the right to use either union or non-union labor, and the other was $2,090, and use union labor only.

The Board accepted the higher, or "union" bid. J. L. Adams, a taxpayer, thereupon filed a bill against Knisely and the Board to enjoin the execution of the contract. The injunction was granted, although the work had begun under the contract.

The Court held that even if the provision had been inserted pursuant to an Act of the Legislature it would be void; that such

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an Act would be unconstitutional, because it would be an infringement upon the constitutional right of the citizen, and tended to create a monopoly and to restrict competition in bidding for work.

The contract was in effect an expenditure of public money for the benefit of a private organization or labor union.

Recently this identical question arose in that State. An ordinance was passed by Chicago to the effect that *every bidder upon public work should agree to use only "union" labor,* and that the contract made in pursuance of such bids should so provide.

The ordinance was declared to be void as discriminating between different classes of citizens and as restricting competition, and increasing the cost of public work.

Fiske *vs.* People, 58 N. E. Rep. 985—A statute which made it a misdemeanor for any person to keep any employee from joining a labor union under a threat to discharge him, was held to be void because it deprived such persons of the freedom of entering into and terminating contracts.

Gillispie *vs.* People, 58 N. E. Rep. 1007 (Illinois).—This ordinance in question violates Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, which declares that " no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And it violates the Constitution of the State of Tennessee, Article 1, Sec. 17.

This ordinance limits the right of the Board of Public Works to contract for the public printing for such of the city's offices as use printed matter with the union label impressed on it. *It limits competition and was so intended, and of necessity increases the price for all such work, and hence is against public policy.*

In Adams *vs.* Brennan, referred to above, the Supreme Court said:

"There is no more reason or justification for such a contract as this than there would be for a provision that no one should be employed except members of some particular party or church. In any such case it might be said that the Board entertained a

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bona fide opinion that the members of some political party were more intelligent and better capable of performing the work, so that better results would be attained; or that the members of a church, on account of their higher standard of morality, would more faithfully and conscientiously carry out the contract. The fact that the Board may have been of the opinion that its action was for the benefit of the public cannot afford a justification for limiting competition in bidders and requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work."

And in the same case the Court further said:

"It is plain that the rule adopted by the Board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition and to increase the cost of work."

And in Holden *vs.* City of Alton, *et al.*, in a more recent decision involving the use of the so-called union label, the Supreme Court of Illinois said:

"The Council cast upon the taxpayers an increased burden . . . solely because it had entered into a combination with a certain class of persons doing printing to restrict the privilege of bidding to such class, instead of leaving it open to all citizens upon like conditions. Such a combination or agreement is in violation of common right, tends to create a monopoly, and cannot be tolerated."

This ordinance deprives those not using the union label of the right of pursuing their business avocation to the extent that their bids for public printing will not be accepted.

In Durach's Appeal, 62 Penn. Stat. page 495, the Supreme Court of Pennsylvania, in referring to such legislation, used the following language:

"Legislation, either to benefit or burden particular classes under the idea that it is for the good of the state at large, infringes upon the natural and guaranteed right of 'acquiring, possessing and protecting property,' subject only to fair and equal contributions to the just and necessary expenses of a government in the exercise of its proper and legitimate functions. A government which assumes the office of controlling and directing the lawful industry of the citizens into the channels which it may choose to deem best, assumes what does not legitimately belong to it."

In the case of the Loan Association *vs.* Topeka, 20 Wall. 655, the Court said:

"To lay with one hand the power of the government on the

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property of the citizen, and with the other to bestow it upon favored individuals, to aid private fortunes, is none the less a robbery because it is done under the form of law and is called taxation; this is not legislation; it is a decree under legislative form."

In State *vs.* Loomis, 115 Mo. 307, Chief Justice Black said:

"Liberty, as we have seen, includes the right to contract as others may; and to take that right away from the class of persons following lawful pursuits is simply depriving such persons of a time-honored right which the Constitution undertakes to secure to every citizen."

In the case of Yick Wo *vs.* Hopkins, 118 U. S. 356, the Supreme Court holds that an ordinance of a city which makes arbitrary and unjust discriminations between persons is a violation of the rights and privileges guaranteed in the Fourteenth Amendment to the Constitution of the United States.

The answer is made that the non-union citizen is not deprived of the right to contract for this work by this ordinance except by his own act in refusing to join the union. So any man could become a Democrat, or a Presbyterian, or a Catholic. And should a law limit public work to any one of these classes, the individual could bring himself within the privileged class by joining it. But he is not compelled to do this.

In *In re* Jacobs, 98 N. Y. 98, the Court of Appeals said:

"Liberty, in its broad sense, as understood in this country, is not freedom from actual servitude, imprisonment or restraint, but the right of one to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation. All laws, therefore, which impair or trammel these rights, which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality, or exclude him from his own house, or restrain his otherwise lawful movements (except such as may be passed in the exercise by the legislature of the police power), are infringements upon his fundamental rights of liberty, which are under constitutional protection."

In People *vs.* Gilson, 100 N. Y. 389, it was said:

"It is quite clear that some one, or all, of these fundamental and valuable rights are invaded, weakened, limited or destroyed by the legislation under consideration. It is evidently of that kind which has been so frequent of late—a kind which is meant to protect some class in the community against fair, free and full competition of some other class. The members of the former class, thinking it impossible to hold against such competition,

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and, therefore, flying to the Legislature to secure some enactment which will operate favorably to them or unfavorably to their competitors in the commercial, agricultural, manufacturing or producing fields."

In Butchers' Union Company *vs.* Crescent City Company, 11 U. S. 146, the Court said:

"A monopoly is defined to be an institution or alliance from the sovereign power of the State by grant, commission or otherwise, to any person or corporation for the sole buying, selling, making, working or using of anything whereby any person or persons, body politic or corporate, are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade. All grants of this kind are void of common law, because they destroy the freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood, and put it in the power of the grantees to enhance the price of commodities. They are void because they interfere with the liberty of the individual to pursue a lawful trade or employment."

In Fishburn *vs.* Chicago, 171 Ill. 338, the Court said:

"It is a well-settled general rule that all contracts in which the public are interested which tend to prevent competition are void."

And in Chicago *vs.* Rumpf, 45 Ill. 90, the Court said:

"It is believed that the result of the authorities warrants the assertion that corporate franchises, whether municipal or private, are conferred in trust for the benefit of the entire body of corporators, and must, like all trusts, be exercised in prudence and discretion. Hence their by-laws must be reasonable, and such as are vexatious, unequal or oppressive, or are manifestly injurious to the interests of the corporation, are void. And of the same character are all by-laws in restraint of trade, or which necessarily tend to create a monopoly."

And to the same effect is People *vs.* Chicago Gas Company, 130 Ill. 293; Foss *vs.* Cummins, 149 Ill. 353.

In Cairo *vs.* Fenchter, 159 Ill. 155, the Court said:

"A city ordinance which unjustly discriminates between persons coming within the same class, and imposes burdens on some from which others are by its terms exempt, is void."

The ordinance under discussion does not undertake to fix a standard of quality, but it singles out a certain class and requires the Board of Public Works to purchase from that class and from no other. This is an arbitrary discrimination and the city has no authority or power to pass such an ordinance.

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City of Chicago *vs.* Rumpf, 45 Ill. 90.
Ingman *vs.* City of Chicago, 78 Ill. 405.
Hannibal *vs.* M. & T. T. Co., 31 M. A. 23, 32, 33.
Allgeyer *vs.* Louisiana, 165 U. S. 578, 589.
Yick Wo *vs.* Hopkins, 118 U. S. 370, 371.
1 Dill on Mun. Corp. (4th ed.), Sec. 322.
Kansas City *vs.* Sutton, 52 M. A. 398, 400.
River Rendering Company *vs.* Behr, 77 Mo. 91.
City of St. Louis *vs.* Russell, 116 Mo. 248, 258.
Eden *vs.* The People, 161 Ill. 296.

The various reasons assigned in these cases are that such ordinances tend to create a monopoly—that they are class legislation, discriminative in their character—that they prevent parties from an equal enjoyment of their property and business, and deprive persons of their property rights in violation of the Constitution by restricting trade and the free use of property on equal terms with others.

Municipal corporations have power to pass ordinances, but in order to be enforcible they must be legal, reasonable, constitutional and not contrary to valid charter provisions, and if they do not comply with these requirements they will be set aside by the courts as invalid and illegal. The basic idea underlying all these decisions is that municipal powers are delegated to and held in trust by the corporation to be exercised for the benefit of all the inhabitants of the municipality equally and impartially.

1 Dillon on Municipal Corporations, 3556.
People *vs.* Armstrong, 16 Am. St. Rep. 584 and note.
Anderson *vs.* City of Wilmington, 10 Am. St. Rep. 175.
Ward *vs.* Mayer, 35 Am. St. Rep. 702 and note.
Robinson *vs.* Mayer, 34 Am., Sec. 633 and note.
City of Topeka *vs.* Cooley, 41 Am. St. Rep. 678.
Champer *vs.* City of Greencastle, 46 Am. St. Rep. 390.
Long *vs.* Taxing District, 7 Lea, 137, and cases cited.
Smith *vs.* Mayer, 3 Head 245.
Maxwell *vs.* Jonesboro, 11 Heis. 257.
Trigally *vs.* Mayor, 6 Cold. 382.

The provisions of the charter are mandatory and must be obeyed by the city and its agents, and if in conflict with an ordinance the charter must prevail.

Worthington *vs.* Boston, 152 U. S. 695.

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Zothman *vs.* San Francisco, 1 Am. Dec. 967.
Whitney *vs.* Hudson, 69 Mich. 1-9.
McDonald *vs.* New York, 25 Am. Rep. 144.
Lancaster *vs.* Miller, 52 Ohio St. 552.
Addis *vs.* Pittsburgh, 85 Pa. St. 379.

It is insisted, however, for the city that if the ordinance is invalid (and its invalidity is now virtually conceded), still the complainants contracted to furnish the material with the label upon it, and not having complied with this contract they cannot recover upon it.

Complainants insist that the requirement of the label was a nullity, and as a matter of fact did not constitute a part of their bid as it was made and accepted, and the contract having been awarded to them, and the material having been furnished in all respects complying with the specifications except the label, they are entitled to disregard the void and illegal requirement and recover for the goods.

The advertisement of the city for the work contained notice that—

"All work before acceptance must have the union label."

In making their bid the complainants specified the goods to be furnished item by item, and offered to furnish such goods, but made no express stipulation to attach the union label, and they insist that the latter stipulation is not part of the specification, and was not assented to and made part of the contract.

The Court is of the opinion that the provision in the contract and advertisement that the goods would bear the union label was invalid, illegal and void, and that the bidders were not bound by the provision, but might ignore the same in making their bids and refuse to comply with the same in executing their contract. The majority of the Court is further of opinion that the insertion of this provision in the contract and advertisement cannot, in the absence of proof, be presumed to have interfered with the competitive bidding, since all bidders must be assumed to have known that the provision was illegal and could not be enforced.

This being so, the contract and bidding must be treated as though no such condition was attached to them, and the complainants having made the lowest bid and having been awarded the contract, and having executed the same in all respects accord-

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ing to the specifications except the requirement as to the label, the city is legally obligated and bound to accept and pay for the goods, and complainants are entitled to recover the stipulated price, and the decree of the Court of Chancery Appeals is reversed and the decree of the Chancellor is affirmed, and the city will pay all the costs of the same. WILKES, *Judge*.

I do not concur in the conclusion reached by the Court. I am of the opinion the ordinance in question is void for the reasons stated in the opinion of the majority, but I think the legal and logical consequence is that the letting of the contract under it was illegal, and complainant is not entitled to recover upon such illegal contract of letting. Memphis *vs.* Memphis Gayoso Gas Company, 9 Heis. 532.

The provision of the charter relating to the letting of contracts is mandatory and controlling, and the bidding not having, in my opinion, been open to free and unrestricted competition was illegal and gave no rights and imposed no liability, even though fully performed by either party.

City *vs.* Broderick, 125 Cal. 139.
McBrian *vs.* Grand Rapids, 56 Mich 95.
McDonald *vs.* Mayor, 23 Am. Rep. 144.
Zoltman *vs,* San Francisco, 21 Am. Dec. 96.

In McDonald *vs.* Mayor, 23 Am. Rep. 144, the Court held, Judge Folger delivering the opinion, that when a charter of a city prohibited it from incurring liability, except in a specified manner, the city was not liable where the method prescribed in the charter was not followed. This is the rule laid down by the Supreme Court of the United States in Bank *vs.* Dandridge, 12 Wheaton 70.

In Zoltman *vs.* San Francisco, 21 Am. Dec. 96, it was held, C. J. Field delivering the opinion of the Court, that the charter of a municipality is the source of its power, and when the mode in which its power on any given subject can be exercised is prescribed by its charter, the mode must be followed or the municipality will not be bound. It would seem to follow as an inevitable conclusion that a contract made in violation of a charter provision cannot be ground for any liability against the corporation, and such contract cannot be ratified by any subsequent act of the municipal authorities.

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See also Memphis *vs.* Memphis Gayoso Gas Company, 9 Heis. 532.

Chief Justice Marshall, in Head *vs.* Providence Insurance Company, 2 Cranch 156, said:

"The act of incorporation is to them an enabling act. It gives them all the power they possess. It enables them to contract, and when it prescribes to them a mode of contracting they must observe the mode as the instrument no more creates a contract than if the body had never been incorporated."

See also McCracken *vs.* San Francisco, 16 Cal. 519.
Land Company *vs.* County of Jack., 39 Iowa 149.
Cowan *vs.* Martin, 63 Am. Dec. 584 and note.
Ferguson *vs.* Halsell, 47 Texas 423.

The requirements inserted in the advertisement for sealed bids containing the provision that the work should bear the union label was calculated to deter free and competitive bidding. Even though we assume that all bidders knew the provision to be illegal and void (a violent presumption), still it is apparent that for such a small bill no bidder would care to incur the trouble and expense of litigation likely to follow a defiance of the provision.

It is safe to presume that complainant would not have done so except to test the question involved, and the record indicates that such was the purpose (and not an illegal one) of the complainant in becoming a bidder and making the contract.

The doctrine is tersely stated in Am. and Eng. Encyc. of Law, 2d ed., vol. 20, p. 1166, as follows:

"A fair competition among the bidders is the same prime object of such provisions, and anything which tends to impair this is illegal. So is a requirement that each bidder shall agree not to employ any one not belonging to organizations approved by certain building trade councils."

Elliot *vs.* Pittsburgh, 6 Pa. Dist. 455.
Van Reipen *vs.* Jersey City, 58 N. J. L. 262.
McCloud *vs.* Columbus, 54 Ohio St., 439.
Cited in Am. and Eng. Encyc. of Law, 2d ed., vol. 20, p. 1166.

I concur, therefore, with the majority in holding the ordinance invalid; but I am of opinion the letting was illegal, and no right exists in either party to enforce it. Justice McAllister joins me in this dissent. WILKES, *Judge.*

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Office of

CLERK OF THE SUPREME COURT

for the Middle Divison of the State of Tennessee.

I, Jas. Turney, Clerk of said Court, do hereby certify that the foregoing is a true, perfect and complete copy of the opinion of said Court, pronounced at its December Term, 1902, in case of Marshall & Bruce Company against City of Nashville, as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the Court, at office, in the capitol at Nashville, on this, the 26 day of January, 1903.

[SEAL.] JAS. TURNEY, *Clerk.*

L. T. DAVIDSON, *ET AL.*,

vs.

CITY OF LOUISVILLE, *ET AL.*

Jefferson Circuit Court, Chancery Branch, First Division, No. 37,395.

OPINION.

This action is brought by L. T. Davidson and August Straus in their capacities as residents and taxpayers in the City of Louisville, and by the Courier-Journal Job Printing Company, as plaintiffs, against the City of Louisville, Charles F. Grainger, Mayor of the said city; Fred R. Bishop, City Buyer of said city; the Globe Printing Company, and Charles T. Dearing, as defendants, for an injunction to prevent the awarding of a contract for printing the reports of the City of Louisville for 1903, under a letting of June 7, 1904, to either the Globe Printing Company or to C. T. Dearing.

By an ordinance of the City of Louisville, approved January 24, 1898, it is provided in substance, that all printing, book making and work of like character used or ordered by the City of Louisville "shall bear the imprint of the recognized union label of the Allied Printing Trades' Council of Louisville, Kentucky, as registered with the Secretary of State"; and that the City Buyer, when advertising for printed matter, shall insert a notice in the

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advertisement, that all bids shall be submitted in accordance with said ordinance. In advertising for these bids the defendant, Bishop, followed the requirements of the ordinance by giving notice that "all bids must be subject to ordinance approved by the Mayor January 24th, 1898."

The plaintiff, the Courier-Journal Job Printing Company, filed a bid by which it proposed to do the work for $2.20 per page, while the defendants, the Globe Printing Company and C. T. Dearing, each offered to do it for $2.60 per page, there being a difference of $240 in the cost of the entire work, under the respective bids. There is no question raised as to the regularity, sufficiency or validity of any of the bids. This motion for an injunction is based upon the single ground that City Buyer Bishop is threatening to and will award the contract to the Globe Printing Company or C. T. Dearing at $2.60 per page, under, and as required by, said ordinance of January 24, 1898, because said Globe Printing Company and said Dearing can comply with the ordinance by using the label of the Allied Printing Trades' Council—commonly called the "Union Label"—while the Courier-Journal Job Printing Company, being an "open shop," cannot use said label upon its work, and cannot, therefore, comply with the requirements of the ordinance. The ordinance is attacked as being unconstitutional, in that it undertakes to make a discrimination between different classes of citizens similarly situated; that it restricts competition in public work and tends to increase its cost and creates a monopoly thereof; that it attempts to confer an exclusive privilege upon certain persons in violation of the Kentucky Bill of Rights, and in awarding said contract to the Globe Printing Company, or to C. T. Dearing, said City Buyer and the Mayor (who must approve the same) will not act in the full exercise of their judgment or discretion, or bona fide, but will do so only under the alleged constraint of the said ordinance, which will require them to so award the contract.

That the ordinance is clearly unconstitutional is conceded by the City Attorney and by the counsel for the other defendants. Indeed, when the ordinance was presented to the City Attorney for examination before it became effective, that official made the following endorsement thereon: "The ordinance is unconstitutional. Examined and disapproved. H. L. Stone, City Attorney."

The legal objection to the ordinance has been well expressed in the following language:

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"Manifestly, if the General Council has the right to restrict competition so far as the public supplies and public contracts are concerned to those only who employ union labor, it would have the same right to pass the same character of ordinance for the benefit of non-union labor, if at any time the friends of non-union labor should get in control of the General Council. And if at any time the majority of the members of the General Council should be members of the Presbyterian Church, or the Methodist Church, or the Baptist Church, or the Catholic Church, or of any other church, or if the majority of them should belong to the Masons, or the Odd Fellows, or the Elks, or any other order, they would have the same right to pass a like ordinance for the benefit of those employing members of their particular church, denomination or order. The result would be that the laws of the city, instead of being enacted for the benefit of all the inhabitants of the municipality equally and impartially, would favor only that class of our citizens who happened to be in political power at the particular time."

It would hardly be contended that the General Council could constitutionally require all city printing to be done in "open shops," or by non-union printers; but such a requirement would be no more unjust to union printers than the present ordinance is to non-union printers. Both classes are entitled to precisely the same consideration; neither is entitled to a preference at the hands of the law. It is elementary that our Goverment is conducted for the benefit of all citizens alike, and not for the special benefit of any one man over his neighbor, and that a non-union workman has no right to say that a union workman shall not be employed in public work. A union workman has all the rights before the law that the non-union workman has, and the General Council cannot, constitutionally, deprive the union workman of the equality.

The authorities are abundant and uniform to the effect that ordinances and laws restricting the right to do public work to a class are unconstitutional and void.

Adams *vs.* Brennan, 177 Ill. 194, 42 L. R. A. 718.
Holden *vs.* City of Alton, 179 Ill. 318.
Fiske *vs.* People (Ill.) 58 N. E. Rep. 986.
Rogers *vs.* Coler (N. Y.) 59 N. E. Rep. 716.
Fineran *vs.* The Central Bitulithic Paving Co., 25 Ky. L. R. 376.

It is insisted, however, that a Court of Equity will not interfere with the discretion of a city officer in letting a contract, and

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that it can only interfere where the officer is about to perform a purely ministerial duty—an act in performance of which he exercises no discretion. That is the general rule. But this case is not within the general rule for several reasons. In the first place the City Buyer is a public officer, and stands in the relation of trustee of the public funds for the taxpayer. It is alleged and not denied that the City Buyer is about to let this contract to one of the defendants at a price which is $240 higher than the plaintiff's bid, and that in doing so he is acting under the illegal constraint of said ordinance and not in the bona-fide exercise of his Judgment. Under this state of record, these facts must be treated as established; and being treated as true, the City Buyer is acting as a mere ministerial agent or officer, and is therefore liable to the process of injunction.

By this motion plaintiffs are only asking that the City Buyer be restrained from awarding the contract to the defendants; they are not asking that the contract be awarded to the plaintiff, the Courier-Journal Job Printing Company. The city is not required by law to have these reports printed and may conclude not to print them, and moreover it reserved the right in its advertisement to reject any and all bids. In the absence of a special statute requiring the work to be done and taking all discretion from the officer, and thus making him a mere ministerial officer, he cannot be required to award a contract to any particular bidder. He can be restrained, however, from acting under a void ordinance which takes all discretion from him, and requires him to dispose of the public money against his judgment and discretion, and in the petition brings this case within this last-named rule, the injunction will be granted.

SHACKLEFORD MILLER, *Judge.*

June 18th, 1904.

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L. T. DAVIDSON, &c., Plaintiffs,

vs.

CITY OF LOUISVILLE, &c., Defendants.

Jefferson Circuit Court, Chancery Branch, First Division,
No. 37,395.

POINTS MADE IN BRIEF BY ALFRED SELLIGMAN, ESQ., ATTORNEY FOR PLAINTIFF.

1. That the ordinance is unconstitutional and void, being in conflict with the Fourteenth Amendment of the Constitution of the United States, in this that citizens not a member of the Allied Printing Trades' Council of Louisville, Kentucky, and not employing members thereof, are abridged in their privileges and immunities as citizens of the United States, and deprived of liberty and property, without due process of law; and denied the equal protection of the law.

2. That it is unconstitutional under Section 3 of the Bill of Rights of the Constitution of the State of Kentucky, in this that the said ordinance constitutes the grant of exclusive, separate public emoluments and privileges to persons members of said Allied Printing Trades' Council of Louisville, Kentucky, or employing members of said Council, and that such separate public emoluments and privileges are not in consideration of any public services rendered.

3. That it is a violation of the inherent equality of all men before the law.

4. Moneys raised by public taxes constitute a trust fund for the benefit of all taxpayers to be administered and spent only for public municipal purposes. That municipal officers are trustees and have no right to divert such trust funds to any other than municipal governmental purposes; that the City Buyer is undertaking, under the direction of said ordinance, to pay $260 more for the public printing than the same can be done for without the operation of said ordinance, and to that extent there is a diversion of public funds to private uses, and a breach of trust that will be enjoined by the court.

5. The injunction is not an interference with the discretion vested in this public officer.

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The legislative department of the City of Louisville has no right to impose upon the discretion of the City Buyer or limit it by an unconstitutional ordinance, nor has he a right to accept or bind his discretion with the terms of such an ordinance.

6. The appropriate remedy is by injunction

7. The Courier-Journal Job Printing Company, on final hearing, will ask for a mandatory injunction directing the contract to be awarded to it under the letting of June 7, 1904, but this question is not now briefed, as it is not involved in this submission of the case.

In support of the above propositions, the authorities referred to in the opinion of the Court, together with many others, were cited.

[From Minneapolis *Tribune*, Jan. 3, 1906.]

ORDINANCE IS ILLEGAL.

Judge Holt Gives Opinion—Court Says that Measure Demanding Union Label on Public Printing is "Unsound and Vicious."

That the resolution adopted by the Minneapolis city council in 1901 requiring the union label on all printing done for the city government is illegal and vicious is the opinion of Judge Andrew Holt of the district court expressed in an order handed down yesterday in the case of the Great Western Printing Company against certain city officers:

"Not only law but common fairness would seem to require a holding that the resolution of the municipality restricting bidding for its work to those who can stamp it with the label in question is as unsound and vicious as would be a resolution that none who can use such label shall bid on the work."

In spite of this opinion, Judge Holt quashes the alternative writ of mandamus issued two weeks ago requiring the city officers to sign a contract with the Great Western Printing Company for a job of printing or show cause why they should not do so. He holds that if the resolution is illegal then the Great Western Company, which was awarded the contract, cannot be considered the lowest bidder, as others were excluded by the terms of the advertisement. Judge Holt says:

"But although this is true," referring to the foregoing quotation from his memorandum, "it would seem doubtful

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whether a court should require public officers to sign a contract based on a bid where bidders were restricted by virtue of tainted resolutions and specifications."

The Great Western Company was awarded a printing contract as the lowest bidder, but when handed a contract to sign, containing the clause providing for the union label, substituted a second contract without the objectionable clause and presented it for signature to the mayor, the city controller and the city clerk. The city officials refused to affix their signatures, and mandamus proceedings were brought.

The illegality of the resolution was not a direct issue in this case, as it was admitted by counsel, for the sake of argument, but the Court commented upon it in his memorandum.

[From Elmira (N.Y.) City Attorney.]

HON. Z. R. BROCKWAY, Mayor, January 12, 1906.
Elmira, N. Y.

My Dear Sir—I herewith return the communication of Mr. C. E. Bruce, the President of the Employers' Association, which you referred to me for my opinion.

After an examination of the question I have come to the conclusion that a resolution requiring the Typographical Union label to appear on all city printing would be unconstitutional. As far as I have been able to discover, the exact question has never been squarely presented in any reported New York case, but it has been considered by the courts of last resort in other States, and as far as I have examined these decisions they fully bear out Mr. Bruce's statement that "such a resolution has been declared unconstitutional wherever brought to an issue."

People *ex rel.* Rogers *vs.* Coler (166 N. Y. 1) and People *ex rel.* Treat *vs.* Coler (166 N. Y. 144) each deal with the question of the constitutionality of the provisions of the Labor law of the State of New York. The first case deals with the provisions of that law that the wages to be paid for a legal day's work upon public works shall not be less than the prevailing rate for a day's work in the same trade or occupation in the locality in question. The second case deals with the provision of the Labor law to the effect that all stone used in State and municipal work, except paving block and crushed stone, shall be worked, dressed and carved

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within the State. Each of these decisions holds the provision in question unconstitutional, and at first blush it would seem that these cases are decisive of the question here involved, but the decisions were upon the ground that it is an invasion by the Legislature of the right of the municipality to contract. I quote from Judge O'Brien's opinion in the Rogers Case:

"The City is a corporation possessing all the powers of corporations generally and cannot be deprived of its property without its consent or due process of law any more than a private corporation can; and since its revenues must be used for municipal purposes, it is difficult to see how the Legislature can make contracts for it which involve the expenditure of these revenues without its consent."

It thus clearly appears that the questions there presented and here presented are different, for it does not follow that the city cannot itself assume such a contractual obligation because the Legislature cannot impose it upon it. Nevertheless, some of the language in these opinions indicates what the decision of the Court would be if the question here presented were presented to it, and aside from the decisions in the courts of sister States, and the elementary principles on which they are based, I am of the opinion that the Court of Appeals would hold such a resolution as the one in question unconstitutional.

I call your attention briefly to some of the decisions of other States.

In Marshall & Bruce Company *vs.* City of Nashville (109 Tenn. 496) the Supreme Court of the State of Tennessee held unconstitutional the following ordinance, passed by the City Council of the city of Nashville: "Be it enacted that all city printing shall bear the union label of Nashville Allied Trades' Council or the label enacted by the International Typographical Union."

The charter of the city of Nashville required that all goods and supplies furnished the city amounting to over fifty dollars must be let out at the competitive biddings to the lowest responsible bidder, and while the decision of the case is largely on the ground that the ordinance is in conflict with the "spirit, purpose and letter of the charter," the principles discussed apply where there is an absence of such charter provision. The Court says: "It is moreover class legislation, contrary to public policy and to the Constitution of the State, plainly discriminative in its charac-

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ter," and again, "It limits competition and was so intended, and of necessity increases the price for all such work and hence is against public policy."

Further on in the opinion the Court uses this language:

"The ordinance under discussion does not undertake to fix a standard of quality, but it singles out a certain class and requires the Board of Public Works to purchase from that class, and from no other. This is an arbitrary discrimination and the city has no authority or power to pass such an ordinance."

The opinion is a very full and exhaustive discussion of the question involved, and the conclusions reached are sustained by numerous authorities. In reference to the cases cited the Court says:

"The various reasons assigned in these cases are that such ordinances tend to create a monopoly; that they are class legislation; discriminative in their character; that they prevent parties from an equal enjoyment of their property and business, and deprive persons of their property rights in violation of the Constitution by restricting trade and the free use of property on equal terms with others. . . . The basic idea underlying all these decisions is that municipal powers are delegated to and held in trust by the corporation to be exercised for the benefit of all the inhabitants of the municipality and impartially."

In Adams *vs.* Brennan (177 Ill. 194) it is held that a provision that none but union labor shall be employed cannot be lawfully made in a contract by a public corporation, as it constitutes a discrimination between different classes of citizens and is of such a nature as to restrict competition and increase the cost of work. I will make but one quotation from the opinion in this case. The Court says:

"There is no more reason or justification for such a contract as this than there would be for a provision that no one should be employed except members of some particular party or church. In any such case it might be said that the Board entertained a bona fide opinion that the members of some political party were more intelligent and better capable of performing work so that better results would be obtained; or that the members of a church, on account of their higher spirit of morality, would more conscientiously carry out the contract. The fact that the Board may have been of the opinion that its action was for the benefit of the public cannot afford a justification for limiting competition in bidders and requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work."

It does not appear in this case whether there was any requirement for letting bids to lowest responsible bidders.

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In Atlanta *vs.* Stein (111 Ga. 789) the Supreme Court of the State of Georgia holds that a municipal corporation, though not required by its charter to let contracts for public work to the lowest bidders, though clothed as to such matter with the broadest discretionary powers, has no authority to adopt an ordinance prescribing that all work of a designated kind shall be given exclusively to persons of a specified class. Such an ordinance is *ultra vires* and illegal because it tends to encourage monopoly and defeat competition, and all contracts made in pursuance thereof are void.

In thus stating the doctrine of this case I have quoted the head note which was written by the member of the court writing the opinion. It may be stated as a general proposition too well established to require the citation of any authorities that the officers of a municipality are trustees for the benefit of the taxpayers, and that in expending the city's moneys they are held to the highest accountability. Even in the absence of constitutional requirements for receiving bids, city officers cannot arbitrarily enter into contracts for the performance of city work, at exorbitant prices, where equally good work could be done by others for less prices, and it follows from this that they have no right to destroy competition or limit it to a particular class, nor have they any right to exclude certain other classes from the right to compete. No one would contend, or even suggest, that it would be a valid exercise of power of the Common Council to pass an ordinance or resolution that no work to be done for the city should be paid for, providing any member of a labor union had engaged in its performance, and no more reason can be given for excluding members of labor unions than for excluding those who are not.

In addition to the reasons given above, I am of the opinion that the right to contract is a property right, and that the Common Council has no power to deprive any person of this right under the Constitution without due process of law. The passage of such a resolution as the one in question would deprive all printing establishments which had not the right to use the union label of the right to contract with the municipality, and would thus deprive them of a property right without due process of law.

Yours truly,

RICHARD H. THURSTON,
City Attorney.

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[From Boston *Globe*, June 7, 1905.]

NOT FOR UNION LABEL.

Lynn Aldermen Refuse to Order it upon All City Printing by Vote of 7 to 4.

LYNN, June 6.—The board of aldermen to-night refused to pass an ordinance making it compulsory on the part of the city to have the public printing done by a concern carrying the union label. The vote was 7 to 4. Those in favor were Miller, Willey, Babb and Call, and those against, Blakely, Holt, Wells, Bartlett, Manchester, Newhall and Fisher.

The vote was taken after several speeches had been made. Great interest was taken in the matter by members of the labor unions, especially the typographical branch, and many persons were present. The committee on ordinances had reported in favor of the ordinance.

Alderman Bartlett said he was not opposed to unions, but favored them. The ordinance, however, he said, was unconstitutional: it was class legislation, in violation of equal rights, and it was not for the best interests of organized labor. There were 74 members of the Typographical Union and 300 men in printing houses here. Alderman Newhall said there were more non-union than union members in the city and he did not believe in class legislation.

same case here

[From Quincy (Ill.) *Whig*, Apr. 27, 1905.]

EMPLOYERS TAKE A DECIDED STAND.

Demand of all Municipal Bodies that Union Label be Abolished—New Council to Hear First—Supervisors and Board of Education Also to be Taken in Hand.

Report had it yesterday that the new council will at once, upon its inauguration, bump into trouble in the shape of a motion to rescind the resolution recently passed by the present body ordering that all printing ordered for the city must bear the union label of the Typographical Union. The matter is said to have been discussed by members of the Employers' Association and is to be taken up in earnest.

The action is to be based, it is said by members of the Employers' Association, on the recent bids for city printing, which

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the present finance committee is to turn over to the new council. The lowest bid was made by the Cadogan-Hatcher Company, a firm which stated in writing that it employed union labor, but did not own or control the union label, and for that reason could not guarantee its use on the printing. The next lowest bid was by the Jones-Zolie Company, and was over $130 higher. This firm guaranteed that all work should contain the label.

It is understood that the point to be made by the Employers' Association is that the council in directing that the work shall be done only by a certain class is class legislation, and therefore unconstitutional and illegal. A demand is to be made that contracts be let to the lowest bidders in all work, regardless of unions.

Further, it is understood that the Employers' Association will not stop at the city council, but will make the same demands of the Board of Supervisors and the Board of Education, both bodies having passed resolutions in conformity with those of the city council. Important developments are expected within the next few days looking toward this end, but no decisive action will probably be taken until each of the boards mentioned have their several meetings. It was stated yesterday that unless the request to rescind the resolutions is complied with the courts will be asked to enjoin them from carrying out contracts made under resolutions.

[From *The Evening Wisconsin,* Milwaukee, Wis., Nov. 10, 1905.]

UP TO THE PRINTER.

City Attorney Rendered Opinion in Regard to Union Label—City can Only Request—Director Arnold's Resolution in School Board Similar to One Considered by Council.

There is on file in the city attorney's office an opinion which was written some time ago which covers the point raised in the school board by Director T. J. Neacy in regard to the union label on public printing.

CITY CANNOT INSIST.

The opinion was requested by the common council, while considering a resolution that all city printing bear the union label. It was decided that the city could not enter into a contract providing for the use of the union label, nor alter any existing contract

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so far as to make that provision, but that the city council could request the public printer to put on the union label, putting it up to him to do as he pleased in that respect.

UNION LABEL IS USED.

As a matter of fact, the proceedings of the common council and the stationery provided for the several aldermen and city officials do bear the imprint of the union label. It is optional with the printer, however, to do this or not, as he sees fit.

"Mr. Neacy does not seem to know what my resolution really provides," said Director W. A. Arnold, the president of the Typographical Union. "It is not at all similar to the fight he had with the Board of Public Works, in whch the contention was that by including a recognition of union principles, including the eight-hour workday, there would not be free competition in bidding on contracts.

DOES NOT RESTRICT COMPETITION.

"My resolution does not provide that the union label shall be put on all school board printing, but merely that when the printing is awarded to a union shop, the union label be used. Non-union shops can bid for the work just the same, and if their bid is accepted they are not affected by this resolution. But when a union shop does get the contract, the union label should be used."

[From Milwaukee (Wis.) City Attorney.]

The following opinion by Carl Runge, City Attorney of Milwaukee, Wis., was submitted to the Committee on Printing of the Common Council of that city. The ordinance referred to in the opinion was not passed, the Common Council abiding by the opinion of the City Attorney. An opinion was rendered about the same time that while the Common Council could request the use of the union label on work done under existing contracts, it could not compel it.

Nov. 16, 1904.

TO THE HONORABLE COMMITTEE ON PRINTING:

Gentlemen—You have referred to me for an opinion the question as to the legality of an ordinance entitled "An ordinance directing and requiring the use of the union label of the International Typographical Union of North America, or its subordinate body, the Allied Printing Trades' Council of Milwaukee, Wisconsin, on all printed matter, blank books, etc., used by the city of

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Milwaukee, Wsconsin, and requiring all city publications to be made in papers employing printers belonging to said typographical union or said subordinate body, the Allied Printing Trades' Council, provided such ordinance should be passed by the Common Council.

Section 1 of said ordinance provides that all printed matter such as envelopes, letter-heads, etc., in or on which printed matter may appear, used, ordered, printed or supplied for use by the city of Milwaukee, its officers or employees, shall have printed thereon the recognized union label of the International Typographical Union of North America, or its subordinate body, the Allied Printing Trades' Council of Milwaukee, Wisconsin.

Section 2 provides that all advertisements of said city of Milwaukee required by law to be published in any newspaper in said city of Milwaukee shall be published in, and the contract for publishing the same shall be let to some newspaper employing members of said International Typographical Union and Allied Printing Trades, and authorized by said Allied Printing Trades' Council to use the label and imprint of said Allied Printing Trades' Council.

Section 3 provides that the City Clerk when advertising for printed matter shall insert a notice that all bids shall be submitted in accordance with this ordinance as regarding said label.

Section 4 provides that all such printed or advertising matter presented to the city of Milwaukee without said label being printed thereon shall not be accepted, used or paid for by the city of Milwaukee or its officers.

The printed matter designated in Section 1 of said ordinance is incidental printing. Section 16 of Chapter 5 of the city charter provides that when the cost of incidental printing shall exceed the sum of two hundred dollars it shall be let by contract to the lowest bidder in the manner provided by Sections 10, 11, and 13 of Chapter 5 of the charter. Section 10 of Chapter 5 of the charter provides that all contracts shall be awarded to the lowest bidder who shall comply with the provisions of Section 9 of Chapter 5 of the charter. Section 9 provides that whenever any public work or improvement shall be ordered by the Common Council, the said Board shall advertise for proposals for doing the same, and plans or profiles of the work to be done, with specifications for doing the same, or other appropriate and sufficient description of the

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work required to be done, and of the kinds and quality of the material to be furnished be first placed on file in the office of said Board for the information of bidders and others.

The charter thus provides for the manner of advertising for bids, and does not provide in express terms nor by necessary implication that the placing of the union label upon printed matter shall be one of the requirements of the specifications. The charter in direct terms and by implication provides that the specifications for the doing of public work must be such as will permit of the freest competition.

This provision of our charter has been thus interpreted by our Circuit Court in a recent decision in the case of Neacy, *et al.*, against the City of Milwaukee, *et al.;* and by the Supreme Court in the case of Ricketson against Milwaukee. The same provisions in the charters of cities of different States have been given the same construction by the courts of last resort of the various States.

As to Section 2 of the proposed ordinance, will state that Section 9 of Chapter 3 of the city charter, as amended by Chapter 98, Laws of 1897, and Chapter 50, Laws of 1903, provide the manner in which newspapers shall be selected by the Common Council to do the necessary official printing. These provisions neither in direct terms nor by implication provide that contracts shall be let to newspapers employing members of said union and authorized to use the label or imprint of the Allied Printing Trades' Council.

The charter, as amended, not so providing, either in direct terms or by implication, the provisions of the ordinance could not be legally incorporated in the specifications for the doing of the city printing; and it was so held in the case of Hall *vs.* Milwaukee, 115 Wis. 479.

As to Section 3 of the proposed ordinance, the duty of advertising for bids for printed matter is imposed by the charter upon the Board of Public Works; and can not be by ordinance delegated to the City Clerk.

As to Section 4 of the proposed ordinance, will state that the city is in duty bound to accept and pay for all printing or advertising matter furnished the city in compliance with the pro-

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visions of the law above cited; and it can not relieve itself of this liability by the passage of the ordinance in question.

From the foregoing I am of the opinion that if the said proposed ordinance were passed by the Common Council, it could not be enforced.

I enclose herewith the copy of the proposed ordinance referred to me, and also the remonstrance of Messrs. Quarles, Spence & Quarles.

Respectfully yours,

(Signed) CARL RUNGE,
City Attorney.

[From Poughkeepsie *Daily Eagle*, Jan. 24, 1906.]

UNION LABEL WIPED OFF CITY PRINTING.

City Attorney Decides Action Was Unconstitutional, and Aldermen Meet to Right the Wrong—Injunction Was Ready.

The opinion of City Attorney Lee follows in full:

HON. GEORGE M. HINE, Mayor.

Dear Sir—In compliance with your request for an opinion as to the legality of the action of the common council in requiring all printed supplies of the city to bear the Typographical Union label, and as a consequence rejecting the lowest bid for printing the annual reports of the city, submitted by a firm not a member of the Typographical Union, and accepting a higher bid from another firm because it was a member of the Typographical Union and could furnish the Typographical Union label, I submit the following as the result of my examination of the matter and the questions involved:

The express powers of the Common Council conferred by the city charter are specifically stated in Sections 28 and 29, and are to be exercised subject to the provisions of the Constitution and laws of the United States, or of this State. Of the powers so conferred it is authorized to enter into contract for services or supplies.

Chapter IV of the Ordinances of the Common Council, entitled "An Ordinance to Regulate Printing for the City of Poughkeepsie," provides that

"all printed supplies, including bill, note and letter-heads, en-

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velopes, cards, blank forms, reports, proceedings and pamphlets for the city of Poughkeepsie, its various municipal boards, officials and agents shall bear the Typographical Union label."

It is to be observed, in passing, that this ordinance was passed by the Common Council on the 25th day of April, 1898, after City Attorney Williams, on March 12, 1898 (see page 150 of printed charter), in answer to an inquiry whether the Common Council could legally enact such an ordinance, had advised the chairman of the ordinance committee that

"every person has a right to bid, and the lowest bidder, assuming that his goods or work are such as would be required by the public interest, would be presumably entitled to the contract. He cannot be deprived of his right because he is or is not connected with this or that organization."

At a meeting of the Common Council held January 15, 1906, a communication was received from Poughkeepsie Typographical Union, No. 315, requesting that all printing done for the city after January 1, 1906, bear the label of said Typographical Union, which was followed by the adoption of a resolution requiring that all printed supplies, etc., for the board of aldermen, its officers or agents, shall bear the Typographical Union label.

Immediately thereafter two bills for printing the annual reports of the city government for the year 1905 were opened, one of which was from a non-union concern at seventy cents per page, and the other from a union concern at seventy-eight cents per page. A motion was made to accept the lowest bid, which was amended by a motion to accept the highest bid on the ground that it was a union concern, which was adopted.

The attempt of the Common Council to legislate in favor of the Typographical Union cannot be upheld. It creates an arbitrary distinction between persons contracting with the city in violation of the equal protection of the law guaranteed by the Federal and State constitutions.

The constitution of the State provides (Art. 1, Sec. 1), that no member of this State shall be deprived of any of the rights and privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers. Section 6 of Article 1 provides that no person shall be deprived of life, liberty, or property, without due process of law. And the Fourteenth Amendment to

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the Constitution of the United States provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." No proposition is now more firmly settled than that it is one of the fundamental rights and privileges of every American citizen to adopt and follow such lawful industrial pursuit, not injurious to the community, as he may see fit. (Live Stock Ass'n *vs.* The Crescent City, etc., 1 Abb. (U. S.) 398; Slaughter House Cases, 16 Wall. 106; Corfield *vs.* Coryell, 4 Wash. C. C. 380; Matter of Jacobs, 98 N. Y. 98.) The term "liberty" as protected by the Constitution, is not cramped into a mere freedom from physical restraint of the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. People *vs.* Marx, 99 N. Y. 386.

The attempt of the Common Council to improperly interfere with the private rights of the citizen is an example of class legislation, which has been condemned in other cases by the Court of Appeals of this State. (People *vs.* Arensberg, 103 N. Y. 388; People *vs.* Gillson, 109 N. Y. 389; Forster *vs.* Scott, 136 N. Y. 577; Wynehamer *vs.* People, 13 N. Y. 378; Bertholf *vs.* O'Reiley, 74 N. Y. 509; People *vs.* Marx, 99 N.Y. 377; People *vs.* King, 110 N. Y. 418; Curran *vs.* Galen, 152 N. Y. 33.)

To use the language of the Court in Curran *vs.* Galen, in the general consideration of the subject, it must be premised that the organization, or the co-operation, of workingmen is not against any public policy. Indeed, it must be regarded as having the sanction of law, when it is for such legitimate purposes as that of obtaining an advance in the rate of wages or compensation, or of maintaining such rate. It is proper and praiseworthy, and, perhaps falls within that general view of human society which perceives an underlying law that men should unite to achieve that which each by himself cannot achieve; or can achieve less readily. But the social principle which justifies such organizations is departed from when they are so extended in their operation as either to intend, or to accomplish, injury to others. Public policy and the interests of society favor the utmost freedom in the citi-

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zen to pursue his lawful trade or calling; and if the purpose of an organization or combination of workingmen be to hamper or to restrict that freedom, and, through contracts or arrangements with employers, to coerce other workingmen to become members of the organization and to come under its rules and conditions under the penalty of the loss of their position, and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions. The effectuation of such a purpose would conflict with that principle of public policy which prohibits monopolies and exclusive privileges. It would tend to deprive the public of the services of men in useful employments and capacities. It would impoverish and crush a citizen for no reason connected in the slightest degree with the advancement of wages, or the maintenance of the rate.

Every citizen is deeply interested in the strict maintenance of the constitutional right freely to pursue a lawful avocation, under conditions equal as to all, and to enjoy the fruits of his labor, without the imposition of any conditions not required for the general welfare of the community. The candid mind should shrink from the results of the operation of the action of the Common Council under review; for there would certainly be a compulsion, or a fettering, of the individual, glaringly at variance with that freedom in the pursuit of happiness, which is believed to be guaranteed to all by the provisions of the fundamental law of the State. The sympathies, or the fellow-feeling which, as a social principle, underlies the association of workingmen for their common benefit, are not consistent with a purpose to oppress the individual who prefers by single effort to gain his livelihood. If organization of workingmen is in line with good government, it is because it is intended as a legitimate instrumentality to promote the common good of its members. If it militates against the general public interest, if its powers are directed towards the repression of individual freedom, upon what principle shall it be justified?

I am advised that it is claimed that Constitutional Amendment No. 4, voted for and adopted at the last general election, has changed the fundamental law so that the action of the Common Council in question is thereby made legal. Such claim is not made with a right understanding of the legal effect of the amendment, for it gives the Legislature power only to fix wages, salaries and hours of labor.

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I am clearly of the opinion that the Common Council had no authority to pass the ordinance or adopt the resolution requiring that the Typographical Union label be placed upon all printed supplies of the city, under which it sought to justify its action in awarding the contract for printing the annual reports of the city to the highest bidder, and that such action was in plain violation of the constitutional provisions to which I have adverted, and was therefore invalid.

WM. MORGAN LEE,
Corporation Counsel.

[From Bridgeport (Ct.) City Attorney.]

TO THE HONORABLE COMMON COUNCIL OF THE CITY OF BRIDGEPORT:

UNION LABEL ON CITY PRINTING.

Gentlemen—On November 8th, last, an action returnable to the Superior Court on the first Tuesday of December, 1904, was brought against the city of Bridgeport and The Joyce & Sherwood Company by R. Frederic Dunham, in which action an injunction was asked for, to restrain the said defendants from carrying out a contract for the printing of an edition of the charter and ordinances of the city. At a meeting of the Common Council held on September 6, 1904, the committee on printing was authorized and directed to receive proposals and award the contract for printing a revised edition of the charter and ordinances, in accordance with certain specifications. In said specifications it was stipulated that the printing should bear the union label. This condition or requirement of the specifications is the grievance complained of in said suit, and is the ground on which the plaintiff bases his application for an injunction. As I have before informed the members of the printing committee who have consulted with me in regard to the question of requiring the union label on city printing, I now beg to advise your honorable body that such a requirement is illegal. This same question, or a similar one, has, within the last few years, been presented to the courts of final jurisdiction in many of our States, and they have held that a resolution or ordinance containing such a condition is invalid. It has been held to be class legislation, tending to defeat competition, and against public policy.

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I would therefore advise that the action of your honorable body, adopting said resolution containing the provision in regard to the union label, be rescinded.

Respectfully submitted this 5th day of December, 1904.

THOMAS M. CULLINAN,
City Attorney.

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STATE OF MICHIGAN SUPREME COURT.

HENRY B. LEWIS, Relator and Appellee,

vs.

THE BOARD OF EDUCATION OF THE CITY OF DETROIT, Respondent and Appellant.

BRIEF FOR RELATOR AND APPELLEE.

This is an application for a writ of mandamus to compel the Board of Education of the City of Detroit to enter into a contract with Relator and to compel the said Board to strike from the said contract a clause relating to the employment by Relator of none but members of union organizations during the performance of the said contract.

STATEMENT OF FACTS.

Under a resolution of the Board of Education of the City of Detroit, and by virtue of estimates voted by the Board of Estimates of said city, it was determined to build a certain schoolhouse in the city of Detroit as a relief to Esterbrook School, to be known as the Goldberg School. The committee in charge of the erection of this new school on the fourteenth of July, A. D. 1904, delivered to George Brown, secretary of the Board of Education, a memorandum in writing containing instructions authorizing the said George Brown to advertise for bids in connection with the erection of the Goldberg School (Esterbrook relief). Pursuant to the said instructions the secretary published in certain newspapers circulating in the city of Detroit the following advertisement:

"*Bids—New School.*

"*Board of Education, Office of Secretary and Business Manager.*

"DETROIT, July 16th, 1904.

"Sealed proposals will be received at this office until 5 p. m., city time, Tuesday, July 26th, next, for furnishing the separate classes of material and labor necessary in the erection of a 15-room building to relieve the Esterbrook School. Plans and specifications may be seen in the office of the Supervisor of Buildings, room 1, this building. Proposals must be submitted

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on forms furnished by the Supervisor and must be accompanied by a certified check or cash equal to six per cent. of bid.

"GEORGE BROWN,
"*Secretary and Business Manager.*"

On Tuesday, the 26th day of July, 1904, before the hour of five o'clock in the afternoon, the Relator submitted his bid or proposal in writing to George Brown, secretary and business manager of the said Board upon a form furnished Relator by the Supervisor of the said Board of Education, which said bid or proposal was accompanied by a certified check equal to six per cent. of his bid or proposal as made by Relator.

The form that was furnished Relator by the Supervisor contained, among other things, the following agreement: " * * * and also agrees to contract that none but union workmen shall be employed, and that they shall be citizens of the United States and, as far as practicable, residents of Detroit."

Relator, in making his proposal on the 26th of July, erased from his proposal the following clause: "that none but union workmen."

The bid was upon the steel work of the said Goldberg School (Esterbrook relief), and was for the sum of nine hundred and sixty dollars. The bid of Relator was the lowest bid and was also the *only* bid made for the steel work of said building. On July 28, 1904, the Board of Education, at a regularly called meeting, awarded the contract for the steel work upon said building to Relator. On page 51 of the official records of the Board of Education is found the following report of the Committee on Real Estate and School Buildings:

"TO THE BOARD OF EDUCATION:

"Your Committee submits for your consideration the accompanying tabulation of bids on the erection of the Esterbrook relief (Goldberg School): Iron work, Henry B. Lewis, $960.00 * * *

"We recommend that contract be awarded to the lowest bidders as follows: Iron work, Henry B. Lewis, $960.00

"We further recommend that the secretary be authorized to return all certified checks deposited with him by bidders, except those of the lowest and second-lowest bidders on each

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class of work, and that the second-lowest bidders shall have their checks returned as soon as the contract in each case shall have been completed.

"Respectfully submitted,

"MARTIN SCHOLL, JR.,
"C. J. GEORGE,
"C. M. BURTON,
"WILLIAM J. LEE,
"ALBERT HELY.

"Inspector Scholl moved the adoption of the report.
"Carried."

At a special meeting of the Board of Education held August 4, 1904, the entire matter of contracts for the erection of the Goldberg School was, on motion of Inspector Hely, referred back to the Real Estate Committee, including the question of the insertion of the "union-labor" clause in the contracts.

On the 11th day of August, 1904, at a regularly called meeting of the Board of Education of the City of Detroit, the following resolution was passed by a majority of the Board (p. 92, official record):

"*Resolved,* that all contracts for the erection of the Goldberg School (Esterbrook relief) be awarded to the lowest bidders for the several classes of work, provided they agree to insert in their contracts an agreement to employ union labor exclusively, and that where the lowest bidder refuses to insert such clause in his contract the contract to be awarded to the next highest bidder who will agree to insert such clause in his contract."

On the 11th day of August, 1904, Relator made formal offer to sign the contract with the Board of Education for the steel work upon said building. On the 20th of August, the action of the Board of Education (relative to the employment of union labor exclusively) was approved by William C. Maybury, Mayor of the city of Detroit. Relator, again, made formal offer to sign the contract with the Board of Education as per his proposal. The secretary of the said Board refused to allow the Relator to sign the contract unless he, Relator, inserted the words "and agrees that none but union workmen be employed." Relator refused to sign such contract, and on the 23rd of August, 1904, he filed in the office of the county clerk for the County of Wayne a petition for a writ of mandamus to compel the said Board of Education to enter into said contract with Relator

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without the agreement relative to the employment of union labor exclusively.

The application was heard and the mandamus issued by five of the Wayne Circuit Judges.

AUTHORITIES.

(1) *Mandamus Proper Remedy:*

This principle is determined in People *vs.* Supervisors, 3 Mich. 479, where Court said:

"A mandamus is a writ of the most extensive remedial nature and often indispensable in the administration of justice in both civil and criminal suits and proceedings, and it may be awarded to any inferior court, corporation or person, requiring them to do some particular act or thing therein specified, which appertains to their office or duty and which the court awarding the writ has previously determined to be consonant with right and justice. It is true that the writ is more generally used to enforce performance of public rights and duties; but it is nevertheless equally true that it may also be used for the enforcement of private rights when they are withheld by public officers; and especially may it be used for the enforcement of this class of rights when no other specific legal remedy is given."

On page 480 of the same volume, it is said:

"They would not have prescribed and fixed a reasonable compensation for the services rendered; they would not have exercised their best judgment under their discretionary power, which was conferred upon them for that purpose; and they would not, therefore, have honestly and faithfully discharged their official duty in this matter, but they would have wantonly and unjustly withheld this claim to the prejudice and injury of the claimant."

It might possibly be contended that in the matter at issue the granting of, or refusal to grant, the contract by the Board of Education is purely a discretionary act, and that the Board cannot be compelled to exercise its discretion either one way or the other. If such a dangerous principle were to receive the approval of the court it would constantly work great injustice and place the expenditure of public moneys in public improvements beyond the pale of law. It is a doctrine well settled by a continued and consistent line of authorities that where a discretion is abused by a public body and made to work an injustice mandamus will issue to compel a procedure on its part which will right the wrong done.

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In the case of Village Glencoe *vs.* People *ex rel.* Owen, 78 Ill. 382, it is said:

"Where a discretion is abused it can be controlled by mandamus."

In the case of People *ex rel.* Tabor *vs.* Taylor, 45 Barb. (N. Y.) 129, it is held that a mandamus is not to be denied merely because the Relator may have a remedy by an action in damages. The same principle of law was handed down in the case of Clark *vs.* Miller, 47 Barb. 38. Relator contends that he has no remedy at law. In the case of Talbot *vs.* The City of Detroit, 109 Mich. 657, it was held that the fact that a municipal contract is awarded to one other than the lowest bidder thereon does not give the latter a right of action at law to recover profits which he might have made had his bid been accepted.

In Tenant *vs.* Crocker, 85 Mich. 328, on page 339 it is said:

"Jurisdiction is given by the Constitution to this court to issue the writ of mandamus, and it is within the province of courts to restrain public bodies and officers of the municipal divisions of the state from exceeding their jurisdiction and to require them to perform such specific duties as the law imposes upon them."

In the case of Attorney General *vs.* Canvassers, 64 Mich. 612, on page 612 it is said:

"But it is within the province of courts to restrain public bodies and officers of counties and other municipal divisions from exceeding their jurisdiction and also to require them to perform such specific duties as the law imposes on them. The power to review action which is not judicial is in no way similar to the power to keep respondents within the line of their duty. This jurisdiction is constantly exercised and the doctrine too elementary to discuss. Every term of court presents instances of such interference."

(2) *The Board of Education Exceeded Its Authority in Passing This Resolution and in Endeavoring to Thus Force Relator to Sign a Contract Requiring the Exclusive Employment of Union Labor.*

The resolution is *ultra vires* and contrary to public policy.

Holden *vs.* City of Alton, 179 Ill. 318—Bill for injunction filed by Charles Holden, praying that the city of Alton be restrained from carrying out a contract for printing. Holden

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was the lowest bidder in his bid for city printing. The council passed a resolution declaring that no printing should be done by anyone who did not hire union labor exclusively. It was held:

"That no question of the qualification of bidders was considered; that the refusal to let to the lowest bidder was not to protect the city with respect to the proper performance of any contract or in the exercise of any discretion, but that the council cast upon the tax-payers an increased burden contrary to the provisions of the statute and ordinances, solely because it had entered into a combination with a certain class of persons doing printing to restrict the privilege of bidding to such class of workers instead of leaving it open to all citizens upon like conditions. *Such a combination or agreement is in violation of common right; tends to create a monopoly and cannot be tolerated.* There is here an unequivocal admission of an arbitrary exclusion from the privilege of contracting with the city or laboring for it of a portion of the citizens for the sole reason that they are not members of an association, and this action increases the cost of the printing to the injury of the tax-payer. The statute and ordinance required the contract to be let to the lowest bidder, and this implied equal opportunity and freedom in all who might choose to bid.

"The lowest bidder was well qualified and able to do the work, and the refusal to award the contract to him was because he did not employ the members of a certain association and could not furnish the label of that organization. The refusal on such ground was merely the imposition of a greater burden on the tax-payers through an attempted abuse of power."

Also Fiske *vs.* Raymond, 188 Ill. 206.

Adams *vs.* Brennan, *et al.*, 177 Ill. 196—Adams, a tax-payer of the city of Chicago, filed a bill to restrain the Board of Education from entering into a contract with one Knisley. The Board of Education had previously entered into an agreement with the trades council that all contracts for work should be done by union labor and that none but union labor should be employed on its school. The Board advertised for bids for roofing, and in its advertisement it added this notice:

"None but union labor shall be employed on any part of the work where said work is classified under any existing union."

One Knisley made a bid of $2,090.00. The complainant's bid was $1,900.00. He stated in his bid that he would not bind himself to use none but union laborers—that he would probably use both. Complainant's bid, though lower, was rejected. The Court said:

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"It is plain that the rule adopted by the Board and included in this contract is a discrimination between different classes of citizens and of such a nature as to restrict competition and to increase the cost of the work. Such an act is null and void.

"There is another ground upon which plaintiff has an undoubted right to maintain his bill, and that is, that the contract tends to create a monopoly and to restrict competition in bidding for work. The Board of Education may stipulate for the quality of material to be furnished and the degree of skill required in workmanship, but a provision that the work shall only be done by certain persons or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to limit competition by preventing contractors from employing any except certain persons, and by excluding therefrom all others engaged in the same work, and such a restriction is illegal. A tax-payer may resist an attempted appropriation of his money in the execution of such a contract.

"No question concerning the merits of labor or trades unions is in any way involved in this case. The right of organization for mutual benefit in all lawful ways is not denied The question is whether the Board of Education has a right to enter into a combination with such an organization for the expenditure of tax-payers' money for the benefit of members of the organization and to exclude any portion of the citizens following lawful trades and occupations from the right to labor. It has no such right. Injunction granted."

Butchers' Union Slaughter House *vs.* Crescent City Live Stock Company, 111 U. S. 746—Upon the question of a monopoly the Court said:

"A monopoly is defined to be an institution or allowance from the sovereign power of the State, by grant, commission or otherwise, to any person or corporation for the sole buying, selling, making, working or using of anything, whereby any person or persons, bodies, politic or corporate, are sought to be restrained of any freedom or liberty which they had before or hindered in their lawful trade.

"All grants of this kind are void at common law, because they destroy the freedom of trade, discourage labor and industry, restrain persons from getting an honest livelihood, and put it in the power of grantees to enhance the price of commodities. They are void because they interfere with the liberty of the individual to pursue a lawful trade or employment."

City of Atlanta *vs.* Stein, 36 S. E. 932—Bill for injunction by one Stein to stop the municipality from carrying into effect a contract between the municipality and the Peace Printing Company. The Common Council of the city had

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passed a resolution that no printing contracts be given by the city except to union printers. The Court said:

"That a municipal corporation, though not required by its charter to let contracts for public work to the lowest bidders, and though clothed as to such matters with the broadest discretionary powers, has no authority to adopt an ordinance prescribing that all work of a designated kind shall be given exclusively to persons of a specified class. Such an ordinance is void; it tends to defeat competition and encourages monopoly. The municipal authorities have no power to enact legislation of this kind."

Chicago *vs.* Rumpff, 45 Ill. 90—By an ordinance of the Common Council of the City of Chicago regulating the slaughtering of animals, a particular building owned by Reed & Company was designated for that purpose and Reed & Company was given the exclusive right, for a specified period, to have all animals slaughtered at their place. The Court said:

"They (meaning the municipal officers) no doubt have the power to designate the particular quarter of the city within which the business may be conducted and prohibit it in others and regulate and restrain them so as to prevent their becoming offensive and injurious; but in doing so all persons should be free to engage in the business within these localities by conforming to the municipal regulations."

People *ex rel.* Peabody *vs.* Chicago Gas Company, 130 Ill. 268—The Court said:

"Whatever tends to prevent competition between those engaged in a public employment or business, or business impressed with a public character, is opposed to public policy, and therefore unlawful. Whatever tends to create a monopoly is unlawful as being contrary to public policy."

"Contracts creating monopolies are null and void as being contrary to public policy." Citing Addison on Contracts, page 743.

"All grants creating monopolies are made void by the common law." 7th Bacon's Abridgment, p. 22.

Zanone *vs.* Mound City, 103 Ill. 552—The Court said:

"Municipal corporations are mere creatures of the legislature and can exercise no powers except such as the state has conferred upon them. All powers they possess are held in trust by them for the people of the municipality and for the public generally. Their governmental and administrative pow-

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ers (other than those conferred by statutory or constitutional enactments, which are self-executing), can only be exercised by appropriate ordinances.

"Such ordinances must be general in character and operate equally upon all persons within the municipality of the class to which the ordinance relates.

"Such ordinances must not be in violation of law, contrary to public policy or unnecessarily oppressive, and must not unjustly or arbitrarily discriminate between citizens of the same class."

In the case of Elliott *vs.* the City of Pittsburg, tried in the Court of Common Pleas, Allegheny County, and reported in the 28th Pittsburg Legal Journal, page 8, the Court said:

"The question is, is the ordinance legal—had the council power to pass it? The acts of Assembly of May 23rd, 1874, P. L. 133, require that all contracts for work to be done for the city shall be performed under contracts to be given to the lowest responsible bidder. This requires a free and open competition by all persons who may wish to bid. Limiting the contractor to employ only a certain class of workmen without regard to qualification prevents free and open competition and may result in a higher price for the work than would be bid by equally competent and responsible contractors who would not bind themselves to employ only the class of workmen designated in the ordinance. The city has a right to protect itself from improper materials or unskillful work, and that can be done whoever the contractor may be. No doubt there are just as competent contractors and just as skillful workmen who do not belong to the associations referred to in the ordinance as those who do.

"The city has no power to say that the 'Building Trades Council of Pittsburg' and they only shall designate the workmen who may be employed on any city work. That is what this ordinance does."

(3) *Lowest Bidder.*

Charter of the City of Detroit, Section 241:

"No contract for the purchase of any real estate or for the construction of any public building * * * or for any work to be done or for the construction of any public work whatever, or for purchasing or furnishing any material * * * if the purchase of said real estate or the expense of such construction shall exceed two hundred dollars, shall be let or entered into except to and with the lowest responsible bidder with adequate security: Provided, that in case of repairing paved streets, building and repairing crosswalks, the Common Council may cause the same to be done by the Board of Public Works

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when so deemed advisable and ordered by a two-thirds vote of all the aldermen elect."

Dillon on Municipal Corporations, Section 466, says:

"Where a charter or incorporating act requires the officers of the city to award contracts to the lowest bidder, a contract made in violation of its requirements is illegal, and in an action brought on such contract for the work the city may plead its illegality in its defense, and neither the municipality or its subordinate officers can make a binding contract for such work, except in compliance with the requirements of the law."

ARGUMENT.

Counsel for Respondent, in his brief, makes the following claims: (1) That the Board of Education is possessed of plenipotentiary power in the management of its affairs; (2) That the Relator ignored the conditions of the contract in making his bid and is consequently not entitled to the contract; (3) That in view of the fact that there was but one bid on this class of work there was no competition and consequently Relator is not entitled to the contract.

These matters Relator desires to discuss at this time.

I.

Relator agrees with counsel for Respondent that it rested in the judgment of Respondent whether or not it would erect this particular school. It had the power and the discretion to build or not to build; but when it determined to erect this particular school it was required to conform to certain modes in the exercise of its purpose. The Board of Education is not a private individual, nor a private concern, nor a private body. It is a public body, with duties imposed upon it by its creator, the Legislature, and with powers granted to it by law. It is a trustee of the people's funds—a public trustee clothed with large powers, given a free use of discretion and responsibility; but, notwithstanding these facts, the Board of Education, a servant of the people, cannot use its powers in the exercise of discretion to perform acts which are *ultra vires,* illegal and contrary to public policy. It cannot exercise those powers so that an injustice is done any class of citizens. It cannot dispose of those funds except in a legal, just and reasonable manner. It cannot discriminate against a certain class and create a monopoly in another class. It cannot exercise its powers in such a discriminat-

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ing manner as to select only one class of men as its agents and servants and forbid another class of men from being employed by it merely because they are not members of certain organizations. It must deal fairly and justly with all. It must use the fund which it holds in trust for the benefit of the whole people, and not for the betterment or advancement of any class.

Let us concede that the Board of Education has all the powers and is invested with the discretion contended for in the brief of Respondent; and that the right to reject any and all bids is given this body. Relator contends, nevertheless, that although the manner in which contracts are to be given is a matter within the discretion of the Board, the bids and contracts are not to be granted or rejected in an arbitrary manner and without good and sufficient legal reasons. The reason for its rejection of a bid, when the bidder is responsible and the lowest, must be one founded in law.

Relator insists that the public good demands that, even in the absence of charter provision, the Board of Education is legally bound to submit its contracts to open competition and to grant its work to the lowest responsible bidder. As is stated above, the Board of Education is a creature of the law, formed for the purpose of promoting the public good, and possesses only such powers as have been conferred upon it by its maker. Like all other municipal bodies it was created and exists for the public advantage and not for the benefit of its officers or of any particular individual or class. It must use the public funds for the best advantage of the public. It must use the funds economically, with judgment and legal discretion, and have always in mind the best interest of the public. To reject the bid of one whose responsibility and ability is unquestioned, and whose bid is the lowest, merely for the reason that the bidder is not a member of a labor organization, is unquestionably an abuse of the discretion granted this body by the Legislature.

The only manner in which the lowest rate for work can be had and obtained is by open and free competitive bidding. It cannot be obtained by limiting the number of bidders to a certain class and selecting just one class of men, members of an organization, to participate in the bidding for the work.

It follows, therefore, as a necessary conclusion, that any resolution or ordinance which contemplates to destroy and does

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destroy this competition is illegal and void and contrary to public policy.

The case of Chandler *vs.* Board of Education, 104 Mich. 294, while not in point in the principal matter of contention in this case, recognizes the fact that the Board of Education, though clothed with certain powers and given a free rein in reference to the management of its affairs, cannot use its discretion in such a manner that it will work an injustice upon the public. It states that had there been fraud, corruption or collusion, or if there had been an abused discretion in the bidding or rejecting of the bid before the court at that time, the decision of the court would have been reversed. Thus, we contend that if the Board of Education abuses its discretion and passes illegal or *ultra vires* resolutions, it is amenable to this court and can be controlled and regulated in its action.

In the case of *Detroit Free Press vs.* the State Auditors, reported in 47 Mich. 144, Justice Cooley says, relative to the proposition of discretion of public bodies in the matter of letting its contracts:

"We cannot control this judicial or discretionary authority, and it is only when they decline to obey the law, whether intentionally or through misinterpretation, that a party who can show his interest is entitled to plain redress."

Relator submits that, following the trend of this opinion, this court can control a municipal body when it disobeys the law passing ordinances and resolutions, and endeavoring to enforce them, which are illegal, void and averse to public good. On the question of bids Justice Cooley, in the same opinion, continuing, says:

"If the proposition for bids was unfair and illegal, a proper remedy might have been found in advance."

That this court can control a discretion of municipal bodies and inferior courts, where there is a clear abuse of discretion and where the exercise of it is made to work an injustice, is well established.

State *vs.* Circuit Judge, 4 La. 48.
In re Conway, 4 Ark. 302.
State *vs.* Circuit Judge, 38 La. 944.
State *vs.* Circuit Judge, 40 La. 206.
Virginia *vs.* Reeves, 100 U. S. 315.

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Union Colony *vs.* Elliott, 5 Colo. 374.
Glencoe *vs.* People, 78 Ill. 382.
Schlaudecker *vs.* Marshall, 72 Pa. St. 207.
Davis *vs.* Commissioners, 63 Me. 398.
The Ideal Manufacturing Company *vs.* Joseph W. Donovan, Mich., decided Feb. 14, 1905.

In the case of Union Colony *vs.* Elliott, cited above, the Court said in part:

"Where a duty is enjoined to be performed with discretion, the discretion cannot be exercised arbitrarily but must be exercised for the public good; and where a discretion is abused and made to work an injustice it is admissible that it be controlled by mandamus."

Tapping on Mandamus, on page 119, states the rule to be:

"Courts will not interfere with the discretion of an inferior jurisdiction when it is exercised with reasonable rules of practice. It must, however, be clearly understood that although there may be a discretionary power, yet if it is exercised with manifest injustice the courts are not precluded from commanding its due exercise, the jurisdiction, under such circumstances, being clearly established."

Relator, therefore, contends (having in mind the authority vested in the Board of Education) that where the discretion and authority of the Board of Education is abused, and it attempts to enforce an illegal, void and discriminating resolution; where the use of its discretion creates a monopoly and works injustice upon the public, this court can control the discretion of this body and direct the Board to remain within the scope of its authority.

II.

Respondent contends that Relator ignored the conditions upon which bids were to be made, and consequently had an advantage over the other bidders in the same line of business; that the intending contractors, if they did bid, would have bid upon the theory of the proposal submitted.

(*a*) Relator submits, in answer, that the clause in the proposal being *ultra vires* and illegal, the bidders must be charged with knowlege of this fact, and the contract and bidding must be treated as though no such condition was attached to them. That the clause in the proposal was *ultra vires* and illegal is

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clearly affirmed and established by the authorities cited in the foregoing portion of Relator's brief.

Holden *vs.* City of Alton, 179 Ill. 318.
Adams *vs.* Brennan, 177 Ill. 196.
Fiske *vs.* People, 188 Ill. 206.
Marshall & Bruce Co. *vs.* City of Nashville, 71 S. W. 815.
Atlanta *vs.* Stein, 36 S. E. 932.
Butchers' Union *vs.* Crescent City, 111 U. S. 746.
Chicago *vs.* Rumpff, 45 Ill. 90.
People *vs.* Chicago Gas Co., 130 Ill. 268.
Zanone *vs.* Mound City, 103 Ill. 552.
Elliott *vs.* Pittsburg, 28 Pa. L. J. 8.

That the bidders were under no obligation to treat this clause fairly and submit to it is plainly stated in the case of Marshall & Bruce Co. *vs.* City of Nashville, *supra.* On page 819 of this report the Court said:

"The majority of the court is further of the opinion that the insertion of this provision in the contract and advertisement cannot in the absence of proof be presumed to have interfered with the competitive bidding, since all bidders must be assumed to have known that the provision was illegal and could not be enforced. This being so, the contract and bidding must be treated as though no such condition was attached to them; and the complainants having made the lowest bid and having been awarded the contract and having executed same in all respects according to the specifications except the requirement as to the label, the city is legally obligated and bound to accept and pay for the goods, and complainants are entitled to recover the stipulated price."

(*b*) Relator further submits, in answer to the general proposition of Respondent above mentioned, that Relator was under no obligation to regard this requirement in the proposal, for the reason that the clause requiring the employment of none but union labor *is not a specification.* As bearing on this question, Relator desires again to call the court's attention to the opinion in the case of Marshall & Bruce Company *vs.* City of Nashville, *supra.* On page 819 the Court said:

"Complainants insist that the requirement of the label was a nullity and as a matter of fact did not constitute a part of their bid as it was made and accepted, and the contract having been awarded to them and the material having been furnished in all respects complying with the specifications, except the label, they are entitled to disregard the void and illegal requirement

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and recover for the goods. The advertisement of the city for the work contained notice that 'all work before acceptance must have the union label.' In making their bid the complainants specified the goods to be furnished, item by item, and offered to furnish such goods, but made no express stipulation to attach the union label, and they insist that the latter stipulation is not part of the specifications and was not assented to and made a part of the contract. The court is of the opinion that the provision in the contract and advertisement that the goods would bear the union label was invalid, illegal and void, and that bidders were not bound by the provision, *but might ignore the same in making their bids,* and refuse to comply with the same in executing their contracts."

(*c*) Relator submits, further, that union labor is not a quality of labor nor better labor, but is merely a designation of that labor done by members of certain organizations known as labor organizations. It is *not quality, but class.* If to-day a workman is not a member of an organization and to-morrow joins an organization, will any one say that the character of the work that he can do or the quality of his labor has been changed, altered or improved by the fact that he has become a member of a labor union? Or, if a member of an organization such as is mentioned resigns, is the quality of his labor different than that executed by him before his resignation?

This same distinction and theory is propounded in the case of Adams *vs.* Brennan, *supra.* On page 2201 the Court said:

"The Board of Education may stipulate for the quality of material to be furnished and the degree of skill to be required in workmanship, but a provision that the work shall be only done by certain persons, or classes of persons, members of certain societies, necessarily creates a monopoly in their favor * * * and such a provision is illegal and void."

Relator therefore contends and submits, in answer to the second proposition of Respondent, that he had a right to ignore the clause in the proposal that is here in controversy; that if there had been other bidders on this class of work they likewise could have ignored this clause in making their bid. Relator, however, submits that the question of competition is not at issue at this time, for the reason that he was the only bidder for this class of work. As is evidenced in the records of this case, Relator was given this contract provided he would agree to insert in the contract an agreement to employ union labor exclusively. There has never been any question raised by

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Respondent as to the responsibility of Relator, nor as to the reasonableness of his bid. The only contention between Relator and Respondent has been relative to the insertion of the said labor clause in the contract. Relator therefore insists that if this court shall find that the said union clause is a nullity he is entitled to the contract, and that the said Board of Education should be compelled to enter into this contract with him.

III.

Counsel has argued that since there was but one bid made on the class of work contained in Relator's specifications, that there must have been a combination of contractors in the city of Detroit controlling these matters.

Relator submits that the matter was not raised by the answer of Respondent, nor in the subsequent pleadings in the court below, but was raised for the first time upon appeal. Even if it had been raised, the final resolution of the Board positively fixes the fact that such a condition was never considered.

Respondent further submits that the best evidence of the reasons for the refusal by the Board of Education to enter into this contract with Relator is the resolution passed by the Board and found on page 92 of the official record of the Board of Education and recited in Relator's petition for mandamus, namely:

"*Resolved,* That all the contracts for the erection of the Goldberg School (Esterbrook relief) be awarded to the lowest bidders for the several classes of work provided they agree to insert in their contracts an agreement to employ union labor exclusively, and that where the lowest bidder refuses to insert such clause in his contract the contract is to be awarded to the next highest bidder who will agree to insert such clause in his contract."

Relator contends that no question has ever been raised by the Board of Education as to his responsibility or as to his qualifications to execute the work for which he made this bid. The fact that there were no other bidders for this class of work should not be made to militate against Relator. The notice was published in papers circulating in the city of Detroit, and any one of the steel contractors doing business in the city of Detroit, or elsewhere, could have bid upon this particular work. The

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fact that no others bid does not show that they did not have the opportunity.

Relator insists that his demand was reasonable and just, and therefore asks judgment and prays that the proceedings granting a writ of mandamus in this case should be affirmed with costs.

GEORGE F. MONAGHAN,
Attorney for Relator.

DECISION OF MICHIGAN SUPREME COURT.

Certiorari to the Circuit Court for Wayne County to review the action of the Wayne Circuit Judges granting the petition of Henry B. Lewis for mandamus to compel the Board of Education of Detroit to sign a contract.

GEO. F. MONAGHAN for Relator and Appellee.
JAMES H. POUND for Respondent.

Before MOORE, CARPENTER, MCALVAY, GRANT and BLAIR, Justices.

CARPENTER, J.—Relator was the lowest bidder—he was, in fact, the only bidder—for the steel work of a school building which Respondent had decided to erect. Later Respondent adopted the recommendation of a committee that the contract be awarded to Relator. Still later Respondent passed the following resolution:

"*Resolved,* That all contracts for the erection of the Goldberg School (the school for which Relator had made his bid) be awarded to the lowest bidders for the several classes of work; provided, they agree to insert in their contracts agreements to employ union labor exclusively, and that where the lowest bidder refuses to insert such clause in his contract, the contract be awarded to the next highest bidder who will agree to insert such clause in his contract."

Relator formally offered and Respondent formally refused to sign the contract according to his proposal, with the union labor clause stricken out. Relator thereupon commenced these proceedings in the Wayne Circuit Court. A hearing was had

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before Judges Hosmer, Donovan, Frazer and Rohnert, who granted a mandamus directing said Respondent to execute said contract with the union labor clause omitted. Those proceedings are brought to this court for review.

We must determine at the outset precisely what objections are open to our consideration. It is quite clear that we are not at liberty to look through this record for the purpose of ascertaining what, if any, valid objections might be made to the order of the trial court. We have a right to reverse such order only for objections presented by the record to the court below, and objections assigned by Respondent's counsel when he obtained the writ of certiorari. See City of Monroe *vs.* Board of Supervisors, II D. L. N. 406. The petition upon which the writ of certiorari was granted assigns no error but this:

"They do not believe the decision of the Circuit Court in this case to be according to law and they pray * * * that the decision * * * may be reversed, vacated and set aside." Under these circumstances, it is no injustice to the Respondent if we look at the brief accompanying said petition to ascertain its objections. In that brief it is said:

"Really there are but these two points to decide in this case.

"First—Has the Board of Education of the City of Detroit the discretionary power to authorize it to segregate the labor it wishes to buy so that it may buy a standard kind or class, not, however, presuming to dictate as to individuals?

"Second—Even if the Respondent was wrong upon the facts shown of but a single bid, should not the order of the Circuit Court to the Board of Education have been to re-advertise for proposals to be made in the open market without any limitations thereon whatsoever?"

Under the rules applicable to certiorari proceedings, we can reverse the order of the lower court only on one of these two grounds.

The second may be eliminated as not having been raised in Respondent's answer.

We conclude, therefore, that the only ground upon which we may reverse the order of the lower court is that Respondent had discretionary power to insert the union labor clause in Relator's contract. Had it?

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It is Respondent's purpose, as shown by the resolution heretofore quoted, to have its work performed by union labor even though it increased the cost to the taxpayers. We are all of the opinion that it cannot effect this purpose and that it has no power to require contractors constructing public buildings to employ union labor exclusively.

"The contract tends to create a monopoly and to restrict competition in bidding for work. The Board of Education may stipulate for the quality of material to be furnished and the degree of skill required in workmanship, but a provision that the work shall only be done by certain persons or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to limit competition by preventing contractors from employing any except certain persons, and by excluding therefrom all others engaged in the same work, and such a restriction is illegal and void.

"No question concerning the merits of labor or trades union is in any way involved in this case. The right of organization for mutual benefit in all lawful ways is not denied. The question is whether the Board of Education has a right to enter into a combination with such an organization for the expenditure of taxpayers' money for the benefit of members of the organization and to exclude any portion of the citizens following lawful trades and occupations from the right to labor. It has no such right."

See also Holden *vs.* City of Alton, 179 Ill. 318; Fiske *vs.* Raymond, 188 Ill. 206; Marshall & Bruce Co. *vs.* City of Nashville, 71 S. W. 815.

It follows that we cannot reverse the order of the Circuit Court.

The decision is affirmed with costs to Relator.

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ELLIOTT

vs.

CITY OF PITTSBURG, *ET AL.*

Municipal Law—Contracts for City Work—Act of May 23, 1874, Construed.

The Act of May 23, 1874, P. L. 233, prescribing that all work to be done for a city shall be performed under contract to be given to the lowest responsible bidder, requires a free and open competition between all persons who may wish to bid.

Municipal Law—Contracts for City Work—Requirements of—Ordinances Compelling Employment of "Union" Labor—Illegality of—Ultra vires.

The councils of the city of Pittsburg passed an ordinance entitled "An ordinance relating to bids for building contracts hereafter to be awarded by the city of Pittsburg," in which it was provided that "before such bids shall be deemed valid and be entitled according to law to award thereon of contracts by the city of Pittsburg, they shall contain, signed by the bidder, the following clauses," among which were: "That the bidder, as contractor, will not employ or authorize or suffer to be employed by any person, by, through or under him, in any manner whatever, any person except persons belonging to the organizations approved by the Building Trades Council of Pittsburg, of the crafts or trades appertaining to the work to be done by persons employed respectively under the terms and provisions of the contract so awarded"; and also, "that failure by the bidder to comply with the above condition shall authorize the director of the department of the city government having charge of said contract to forfeit the same and to complete the work contemplated in such contract at the costs of the bidder, and to hold the bidder and his sureties responsible to their respective original liability, as well as for any extra cost that may be incurred by reason of forfeiture and completion of said contract by such director." *Held,* that the city has no right to say that the Building Trades Council of Pittsburg, and they only shall designate the workmen who may be employed on any city work, and thus limiting the contractor to employ only a certain class of workmen, without regard to qualifications, prevents free and open competition as required by said Act of May 23, 1874; and, further, that the provisions of the ordinance

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authorizing the director of the department of the city government having charge of the contract to forfeit the same upon a violation of the ordinance is unreasonable and oppressive, well calculated to deter bidders and be injurious to the city, and places the contract at the mercy of the director; therefore, said ordinance is illegal and beyond the powers of the councils.

Bill in equity for injunction. C. P. No. 2. Allegheny County, July T., 1897, No. 251.

J. M. SHIELDS, for complainant.

CLARENCE BURLEIGH, City Solicitor, and A. C. ROBERTSON, for defendants.

FINDINGS OF FACT.

WHITE, P. J., June 26, 1897.—1. The councils of the city of Pittsburg passed an ordinance entitled "An ordinance relating to bids for building contracts hereafter to be awarded by the city of Pittsburg," in which it was provided that "before such bids shall be deemed valid and be entitled according to law to award thereon of contracts by the city of Pittsburg, they shall contain, signed by the bidder, the following clauses," among which were the following: "That the bidder, as contractor, will not employ or authorize or suffer to be employed by any person, by, through or under him in any manner whatever, any person * except persons belonging to the organizations approved by the Building Trades Council of Pittsburg, of the crafts or trades appertaining to the work to be done by persons employed respectively under the terms and provisions of the contract so awarded." And also this: "That failure by the bidder to comply with the above condition shall authorize the director of the department of the city government having charge of such contract to forfeit the same and to complete the work contemplated in such contract at the costs of the bidder, and to hold the bidder and his sureties responsible to their respective original liability, as well as for any extra costs that may be incurred by reason of forfeiture and completion of said contract by such director."

2. On Feb. 24, 1897, Edward M. Bigelow, as director of the department of public works, advertised for proposals for doing certain work for the city, among which was the painting of engine-room and boiler-room at Herron Hill Pumping Station, painting fences around reservoirs at Highland Park, painting

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fences around reservoir at Herron Hill, painting engine and boiler-rooms at Lincoln Pumping Station.

3. That the plaintiff put in bids for said painting for the sum of $1,358, which was the lowest bid received for said work, and reported by said Bigelow to the committee on public works as the lowest bidder and entitled to the award. But before the committee took action on the same, at the request of said Bigelow, the resolution approving the award was returned to said Bigelow for the purpose of readvertising for bids. The first advertisement did not require that the bids should be under and subject to the above-recited ordinance, and the plaintiff's bid was made in pursuance thereof.

4. The director of the department of public works then advertised again, making the bids subject to the provisions of the above-recited ordinance. The plaintiff did not bid; others did. Under the restraining order of court, the bids have not been opened, awaiting the decision of the court in this case.

CONCLUSIONS OF LAW.

The prayers in the bill are (1) that the said ordinance may be declared illegal; (2) that the director be restrained from further advertising for bids for said work; (3) that injunction issue; (4) that the contract be awarded to plaintiff.

The director awarded the contract to plaintiff under the first bidding; but that had to be approved by the committee on public works and by councils before there could be a valid contract. There was therefore no valid contract with the plaintiff and no award on the first bidding. Under these facts, the plaintiff is not entitled to have the contract awarded to him.

The main question is, Is the ordinance legal—had the councils power to pass it?

The Act of Assembly of May 23, 1874, P. L. 233, requires that all contracts for work to be done for the city shall be performed under contract "to be given to the lowest responsible bidder." This requires a free and open competition by all persons who may wish to bid. Limiting the contractor to employ only a certain class of workmen, without regard to qualifications, prevents free and open competition, and may result in higher price for the work than would be bid by equally competent and

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responsible contractors who would not bind themselves to employ only the class of workmen designated in the ordinance. The city has a right to protect itself from improper materials or unskilful work, and that can be done, whoever the contractor may be. No doubt there are just as competent contractors and just as skillful workmen who do not belong to the associations referred to in the ordinance as those who do.

The city has no right to say that the "Building Trades Council of Pittsburg," and they only, shall designate the workmen who may be employed on any city work. That is what this ordinance does.

6 DIST. R. 456*

Another provision of this ordinance is unreasonable and oppressive, well calculated to deter bidders and be injurious to the city. The contract is at the mercy of the director of the public works. If one or two men not of the associations sanctioned by the Building Trades Council should be engaged on the work, employed by him or by some foreman, the director may declare the contract forfeited, and then go on and complete the contract in his own way, and hold the contractor and his sureties to all costs and additional expense.

We consider the ordinance illegal, beyond the power of the councils, in the particulars above indicated. Bids should be free and open to all competitors, and contracts awarded to the lowest responsible bidders without the limitations and restrictions imposed by said ordinance. Let decree be drawn accordingly.

To the Chairman and Members of the Committee on Labor, Fifty-Second General Assembly of the State of Tennessee.

Gentlemen—This, House Bill No. 376, bill to require all public printing to bear the Union Label on it, when analyzed, means:

1st. That no printing establishment in the State can have any of the contracts to do such printing awarded to it, no matter how well epuipped the establishment may be, no matter whether it be the lowest bidder or not, unless such printing establishment has in its employ none but "union men"; i. e., men who belong to the Printers' Union or Allied Trades. If such establishment wishes to bid for and have awarded to it any of the public printing

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of the state or state officials, it must either discharge every man in its mechanical department who is not a member of one of these "unions," or compel all such to join the unions. Many high class, and other classes of men employed in the various printing establishments in some one or other of the departments, do not belong to the union and will not join it; hence, the establishment that does not employ all union men has no right to use the union label-mark.

2d. The passage of this law will result in compelling State officials to violate the law requiring all printing that is let out under biddings to be awarded to the lowest bidder, for it will happen (as it has already as to the city printing) that the lowest bidder has no right to use the union label, because such bidder does not happen to have in his employ all union men.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the governor, secretary of state, treasurer, comptroller, adjutant general, railroad commissioners, commissioner of agriculture, superintendent of public instruction, commissioner of labor, librarian, penitentiary commissioners, superintendents of insane asylums, superintendent of blind school, superintendent of soldiers' home, superintendents of deaf and dumb asylums, and heads of all other state institutions, state boards, or state commissions, shall severally solicit bids in at least four cities of this State where there is a printing and bookbinding establishment capable of doing the work, for all blank books, printing and stationery that may be needed in their respective offices and institutions for all amounts over the sum of twenty-five ($25) dollars, and work shall not be designedly divided so as to fall below the ($25) twenty-five dollar limit, and the contract for said blank books, printing, and stationery shall be let to the lowest responsible bidder.

3d. If the laws on the statute books are amended, or repealed so as to make the proposed law effective, why then the General Assembly, the Constitution to the contrary notwithstanding, creates a monopoly pure and simple, by giving all of the public printing to a *class* of establishments, and that too at higher rates for the work than would otherwise have to be paid.

4th. The passage of the proposed law, and the amendment of the other laws so as not to conflict with the one proposed [the Constitution out of the way] would mean to absolutely prohibit competition for the privilege, and in the price, of public printing.

The courts will set any such law aside. It ought not to pass, for it will certainly involve State officials and others in useless litigation.

Such laws have been pased in other states, and I wish now

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to point out that in all such cases whenever and wherever such laws have come before the courts they have been declared void, upon various grounds, which will appear in what follows.

I prefer to let the facts appear as stated by the courts, and then to give the opinions of the courts.

J. H. Bruce.

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IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA.

THE STATE OF NEBRASKA, *EX. REL.* BERTHA GETZSCHMANN, Relator,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY, NEBRASKA, Respondents.

Docket 71, 365.

OPINION BY HON. WM. W. KEYSOR, BEFORE WHOM THIS CASE WAS TRIED, MARCH 8, 1900.

This action is brought by the relator against the respondents for the purpose of obtaining a writ of mandamus commanding the respondents to award to her a contract for furnishing stationery, blanks, printing, and printed supplies for the use of said county during the year 1900. I will speak of this case as Mr. Getzschmann's; for, while the plant is owned by his wife, he is really the business manager in the transactions which have been had with the County Commissioners.

About one year ago the Board of County Commissioners adopted a resolution to the effect that thereafter the county supplies must be furnished by persons who could supply a union label, known as the "Allied Printing Trades Council Label," which was to be printed upon or attached to every article furnished. Of this resolution Mr. Getzschmann had full knowledge at the time he made the bid in question. As the Court is informed, the resolution was passed at the time without reference to any particular person, and for the purpose of securing union labor supplies for the use of the county. During the year 1899 Mr. Getzschmann furnished some considerable quantity of supplies which were received by the county, notwithstanding he was unable to furnish the label aforesaid. His workmanship and supplies have always been satisfactory, and the County Commissioners do not now refuse to enter into a contract with him on account of any inability on his part to fulfill it properly and to their satisfaction.

Last fall the respondents advertised for bids for supplies for this year. In that advertisement they reserved the right to reject any and all bids, but they do not claim in this case any right to

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do so arbitrarily and without a reasonable ground therefor. In this advertisement they did not advertise for bids from persons who were able to furnish said union label, or stipulate that the supplies should come from union shops or be made by union labor. In response to that advertisement Mr. Getzschmann filed a bid for the furnishing of a large part of the supplies advertised for, and it is conceded on this trial that his bid is the lowest responsible bid, and that it would be accepted by the County Commissioners if he were able to furnish the Allied Printing Trades Council union label. By refusing to award him the contract the County Commissioners, as shown by the undisputed testimony, say in effect to Mr. Getzschmann, your workmanship is good, your material is good, your bid is the lowest, but we refuse you the contract solely for the reason that you are unable to furnish the label in question." The answer alleges that the contract has already been let to some other person, but there is no evidence of that fact, and this case will therefore be decided upon the theory that the Commissioners are still free to award the contract asked for.

The first defense made by the respondent is, that the bond furnished by Mr. Getzschmann has no revenue stamp thereon, and that therefore the relator has not furnished such a bond as the statute and the revenue law require. The relator admits that no stamp was attached to the bond, but alleges that it was merely an oversight, and now asks leave to affix the proper stamp. The revenue law was passed for the purpose of obtaining revenue for the government, and if the government receives the revenue required in this case, the end sought by those laws will be accomplished. Inasmuch as the omission of the stamp was a mere oversight, the Court is of the opinion that the relator ought to be given leave to attach the stamp at this time, and that the respondents will not be prejudiced by their doing so.

A second defense to this case is that of *res adjudicata*. It is true that a similar case between these same parties was tried here last January; that the relator introduced her testimony, and that the respondents refused to offer any evidence. The case was submitted to the Court on one proposition, namely, that there had been no demand upon the County Commissioners for the contract, and the Court so found and dismissed the action for that reason. Thereupon the attorneys in the case prepared a journal

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entry which was signed by the Court and which contained the following language: "I find for the respondents and against the relator, and that there is no proof that the relator made a demand that the respondent perform any duty, or that the respondent had failed to perform any duty." No evidence has been adduced on this trial as to what issues were submitted to the Court in the former case, and the Court must therefore determine what was really before the Court in the former case from this language of the journal entry.

The testimony in this case shows that since the former trial the relator has made due and legal demand upon the respondents for an award of the contract aforesaid. It is the law that where a party has been defeated in an action because of his failure to perfect his cause of action by making a demand, that he may subsequently perfect his cause by making said demand, and that the former action will not be a bar to the action brought after demand has been made. It is also the law that the record of the former trial which is offered in evidence must show that the issues involved in the second trial were necessarily involved and decided in the first case, which is pleaded as *res adjudicata*. The language above quoted from the journal entry does not show that the issue of union labor was necessarily passed upon in the former trial, but, on the contrary, it does show that the Court might have and probably did dispose of that case for the reason that no demand had been proved. The Court is therefore of the opinion that the defense of *res adjudicata* pleaded in this case has not been established.

The defense chiefly relied upon in this case, however, is that union labor and union-labor-made goods are better than other kinds of labor goods, and that the County Commissioners have a right, therefore, to stipulate by such a resolution as the one above mentioned, that only union-labor-made goods shall be furnished to the county under an advertised bid for supplies for the use of public officers. Before considering this defense upon its merits, it will be well to quote the statute with reference to the furnishing of printing and stationery to the county by contract. Section 149 of Chapter 18 of the Compiled Statutes of Nebraska reads as follows: "In all counties where the cost of furnishing the offices with books, blanks, and stationery shall exceed the sum of $200 per year, the supplies for such purposes shall be let in separate

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contracts to the lowest competent bidder, who shall give bond for the faithful performance of his contract with at least two good and sufficient sureties, residents of the State." The above section contains no provision which gives the County Commissioners the right to confine the awarding of contracts to any class or classes of people. Neither it nor any other section of our statute provides that they may award contracts exclusively to any particular class of persons, such as union men, non-union men, Free Masons, or Catholics. Indeed, it says that they shall award the contract to the lowest competent bidder, and that they shall be protected by a proper bond, which is to be approved by themselves. If the County Commissioners are satisfied that the lowest bidder is competent to carry out the contract, that he is a *bona fide* bidder and has furnished a proper bond, it is then their duty to award him the contract without reference to where or how he procures the goods or whether they are made by union or non-union labor. And it is the opinion of the Court, until the Legislature shall by statute give the County Commissioners power to discriminate between bidders on account of the character of their employees as to being union or non-union men, that they have not such right, and cannot exercise it to the prejudice of any person who is a competent bidder and entitled to the contract advertised for.

A considerable evidence has been offered to show that union labor is better than non-union labor, for the reason that union men are better workmen and receive better wages. The Court knows, as does everyone else, that there are good workmen who do not belong to a union, and that there are bad workmen who do belong to unions, but the testimony shows to the satisfaction of the Court that, as a rule, union labor is of better quality than non-union labor, for the reason that union labor is better paid, and therefore attracts to the unions the best workmen. The answer to this part of the defence is, that this is not really a case of discrimination between union and non-union labor at all. The real question is not whether the County Commissioners are going to protect union labor, but whether or not they are going to drive out of the market an employer who employs all union men but one, and whether or not they are going to drive that one out of the means of livelihood which he has selected for the support of himself and his family.

The undisputed testimony in this case shows that all of Mr.

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Getzschmann's employees, except a pressman, are union men, and that that pressman has applied to the union for admission and for some reason unknown to the Court has been refused. Mr. Getzschmann's union employees come upon the stand and testify that the pressman is a first-class workman, a reliable and responsible man, and he himself testifies that he does now and has for a long time received larger wages than are paid to union pressmen generally. Mr. Getzschmann would be pleased to have his pressman join the union in order that he may have an entirely union shop, but he refuses to discharge him because the unions will not accept him, and therefore claims that he shauld not be discriminated against for the reason that he is unable to furnish to the County Commissioners the union label asked for, because of his employment of said pressman. Were Mr. Getzschmann to discharge this pressman, that employee would be compelled to abandon his trade and seek some other means of livelihood, if the principle sought to be enforced by the union were applicable in all our large cities where pressmen are employed. No reason is shown to the Court why the pressman should not be received into the union, and having made application for membership and been refused, this Court is of the opinion that it would be unlawful and unjust to deprive the relator of the benefit of the contract which he is entitled to by virtue of being the lowest bidder, and having complied with all the provisions and conditions required by law, and that it would also be illegal and unjust to require him, for the purpose of obtaining public work, to throw out of his employment a skilful and trusted workman.

The Court does not intend to decide whether or not, aside from the statutory provisions above quoted, the County Commissioners would have the right to advertise exclusively for union labor and union-made goods, and to refuse to accept the bid of an employer whose shop was wholly non-union. It might be true that, under the general provision that the County Commissioners may reject any and all bids, they would have a right to reject the bids put in for non-union labor goods on the ground that there is a sufficient difference between the quality, generally, of union and non-union labor to justify them in taking such action.

Under the circumstances of this case, however, the Court is of the opinion that the peremptory writ prayed for should issue, and it is so ordered.

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IN THE DISTRICT COURT OF NEBRASKA IN AND FOR DOUGLAS COUNTY.

THE STATE OF NEBRASKA UPON THE RELATION OF BERTHA GETZSCHMANN, Plaintiff,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF DOUGLAS, NEBRASKA, Defendant.

Order allowing premeptory writ of Mandamus.

The case came on for hearing upon the alternative writ of mandamus heretofore issued, the return thereto, the answer and the evidence, and was submitted to the Court on consideration whereof the Court finds the issues in favor of the relator, plaintiff.

It is therefore considered by the Court that a peremptory writ of mandamus issue against the Board of County Commissioners of Douglas County, Nebraska, respondant, defendant, commanding said board forthwith to award to the above-named relator, plaintiff, the contract, and to enter into contract with the said relator, plaintiff, for the furnishing of the books, blanks, printing and stationery required for the use of the officers of said county during the year following January 1, 1900, which are included in the bid of said relator, plaintiff, filed with the county clerk of said county, during December, 1899, and which are more particularly described as follows, to wit:

[Here follows description of work.]

and to do that without demanding from said relator, plaintiff, as a condition that she furnish the "Allied Printing Trades Council" label or any other label. It is ordered that the relator, plaintiff, be and she is hereby given leave to attach to her bond and to the justifications of the sureties on said bond the necessary internal stamps and to properly cancel the same.

It is further considered that the said respondent, defendant, pay the costs of this action taxes at $———.

———————————,

Judge.

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SOME REASONS WHY PRINTING ESTABLISHMENTS DECLINE TO JOIN THE UNION.

NORWOOD PRESS.
OFFICE OF J. S. CUSHING & CO.
Norwood, Mass., November 16, 1900.

TO THE OFFICERS AND MEMBERS OF TYPOGRAPHICAL UNION, No. 228:

Gentlemen—In response to the request of your committee, October 31st, 1900, that we unionize our office, we beg to submit that for the following, and many other reasons, we feel obliged to decline to make so serious a change in our present methods:—

1. It is perhaps unnecessary for us to call your attention to the fact that we are in no case paying less, and in most cases we are paying more than the union scale. We were among the very first to voluntarily establish the nine-hour day without corresponding reduction of pay, and in all other things affecting the comfort and interests of our employees we think you will admit that we have been as considerate and liberal as circumstances would permit. This being the case, we fail to see why we are not voluntarily fulfiling the very conditions which unionism claims it seeks to establish without the disadvantages which are briefly outlined below.

2. Union requirements, so far as we understand them, would necessitate our giving up certain details of business management to an organization which does not and cannot understand all the conditions necessary to conduct it successfully, and who have no responsibility for it, either financial or legal. It would necessitate our subscribing to laws already made, and to others to be made, in secret session, to which we are not parties, about which we are not invited to express an opinion, and of which we may know nothing until arbitrary orders are received.

3. In order to conduct this business successfully we must reserve the right to perfect freedom in the selection of employees. No competitive business requiring expert labor can be carried on successfully if it is forced to select and retain its employees for any other reason than for merit and ability.

4. By this change conditions would be created which would be unjust to the greater part of our present employees and with

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absolutely no corresponding advantage, so far as we can see, to any one; conditions which would make it impossible for us to compete for much business which we now get at the highest market rates. Female compositors now receiving full value for the class of work they do would either be forced out of the business altogether or compelled to demand extra wages, which, if granted, must be taken from others who furnish a higher class of service, and who are now receiving this extra wage. To illustrate: A girl who sets up the plain part of an algebra receives $12.00 per week; the man who does the difficult part of the work receives $18.00 per week. Force the girl's pay up to $15.00, and there is but $15.00 per week left for the man. In other words, as you increase the cost of the inexpert labor, a corresponding reduction must be made in the pay of expert labor, since the amount of money which can be paid out upon any given piece of work is necessarily limited by the demands and necessities of competition. The best proof of the above statement is the well-known fact that in "card offices," *with the very few exceptions*, all men, good, bad, and indifferent, receive the same rate —which is invariably the *minimum* rate.

5. Of 200 (on an average) employees in the composition room department, we understand about 60 are union members. Have not the 140 non-union people a right to be considered before we consent to make a change which would compel them either to forfeit their positions or to join the union against their wishes?

6. Could existing union rules be made national law, all printers would start, at least, from the same basis. As the matter stands to-day, however, the comparatively few firms who would submit unreservedly to the rules of the International union would be seriously handicapped by competition from the many other firms not so controlled.

7. While we are fuly convinced that unions properly conducted within legal limitations are capable of much good, we are firmly and unalterably opposed to *enforced* unionism. And while we concede and will protect the right of any man to belong to the union if he so elects, and will allow no discrimination against him for that reason, we also must *on the same principle* sustain and protect a man in his undoubted right as an American citizen to remain out of the union if he so desires.

8. Our knowledge of the conditions existing in a number

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of strictly union offices certainly does not recommend the plan to us as an advantage either to employer or employee.

9. Under present conditions no agreement with unions is valid, since they are not incorporated, cannot be sued for breach of contract and are not therefore responsible parties before the law. The proprietor can be sued and compelled to carry out a contract over his signature. Not being a corporation, the union cannot be so compelled.

10. The United Typothetæ of America, to which we as a firm certainly owe the same allegiance that your union does to the international union, has unanimously and emphatically put itself on record as against the principle of enforced unionism, and is now actively engaged in raising a fund of $100,000, or as much more as may be necessary, to protect its membership in the right to employ whom they choose in the conduct of their business; and have also resolved that this right is not a matter for arbitration, but one which is absolutely necessary to the interests of all concerned, both employer and employee.

11. With the exception of the heads of departments, we have no objection to any one in our employ voluntarily becoming members of the union. You have always had and exercised perfect freedom in bringing recruits into your ranks. We cannot bring ourselves, however, under any circumstances, to try by any means to compel a person to join your union, who, for any reason satisfactory to himself, prefers not to take membership. In declining membership he is simply exercising his right as an individual, which right, if taken away from him, brings him to a condition little better than that of a slave forced against his will to subscribe to principles and acts which his judgment and conscience disapprove.

Finally, the matter now at issue between us being one neither of wages nor hours of labor, but simply a question of our giving up our unquestionable rights in the selection and retention of our employees, we sincerely hope that your union in considering this matter will allow wise counsels to prevail, and will remember the pleasant and mutually considerate relations which have existed so many years between this firm and its employees, union and non-union.

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We also hope that the pursuit of a theory of doubtful advantage will not be allowed to jeopardize the fairly prosperous conditions under which we are now and always have been working together.

J. S. CUSHING & Co.

I beg to submit these reasons without comment, as they are so clear and concise that they need no illustrations to enforce their wisdom, justice, and fairness.

CITY OF ATLANTA, *ET AL.*

vs.

STEIN.

Supreme Court of Georgia. Aug. 9, 1900—Municipal Corporations—Contracts—Monopolies.

A municipal corporation, though not required by its charter to let contracts for public work to the lowest bidders, and though clothed, as to such matters, with the broadest discretionary powers, has no authority to adopt an ordinance prescribing that all work of a designated kind shall be given exclusively to persons of a specified class. Such an ordinance is *ultra vires* and illegal, because it tends to encourage monopoly and defeat competition, and all contracts made in pursuance thereof are void.

(Syllabus by the Court.)

Error from Superior Court, Fulton County; J. H. LUMPKIN, Judge.

Action by George Stein against the city of Atlanta and others. Judgment for plaintiff. Defendants bring error. Affirmed.

J. A. ANDERSON, J. T. PENDLETON, LUMPKIN & COLQUITT, and C. T. LADSON, for Plaintiffs in Error.

C. W. SMITH and ARMINIUS WRIGHT, for Defendant in Error.

LUMPKIN, P. J.—The mayor and general council of the city of Atlanta adopted the following ordinance:

"An ordinance requiring the union label of the Allied Printing Trades Council on all city printing.

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"Section 1. Be it ordained by the mayor and general council that all printing, of whatever character, used for or by the city of Atlanta, shall bear the Allied Printing Trades Council union label of Atlanta, Georgia, as registered with the secretary of state.

"Section 2. Each and every city official when advertising for bids for printed matter shall specifically state in said advertisement and shall notify bidders that all bids shall be made in accordance with this ordinance.

"Section 3. All ordinances or parts of ordinances in conflict with this ordinance are hereby repealed."

This ordinance went into effect March 9, 1900. In obedience to its requirements the city comptroller made a contract with the Pease Printing Company, a member of the union, to do certain printing at an agreed price. Stein, a citizen and taxpayer of Atlanta, filed an equitable petition to enjoin the municipal authorities and the Pease company from carrying this contract into effect, and the former from further enforcing the ordinance mentioned. At the hearing it appeared that there were in the city four union and fifteen non-union printing establishments, and that the comptroller, solely because of this ordinance, refused to entertain bids for printing from the proprietors of any of the latter. The evidence was conflicting as to the value the work embraced in the contract with the Pease company, but the preponderance of it was to the effect that it was worth less than the price to be paid that company; and that the city, if the non-union printers had been allowed to compete for it, could have made a more advantageous contract. The charter of the city does not require the mayor and general council to let contracts for public work to the lowest bidder, but, under its provisions, the municipal authorities are, as to such matters, invested with a wide discretion. The injunction was granted, and the defendants excepted. As the contract was made strictly in pursuance of the ordinance, the validity of the former depends upon that of the latter. If, therefore, the ordinance was void, and it was right to enjoin the further enforcement, of it, there was certainly no error in preventing by injunction the consummation of the contract. The fall of the ordinance necessarily carries with it the agreement, which had no other source of vitality. In our judgment, the ordinance was void, and the injunction was properly granted. It cannot be seriously denied that the ordinance tended to defeat competition and encourage monopoly. Indeed, the evidence intro-

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duced before the trial judge fully warranted a finding that such was not only the tendency, but the actual effect, of the ordinance. It is not within the power of municipal authorities to enact legislation of this kind. On the contrary, with all respect to the members of the city council, we are constrained to hold that so doing is an unwarranted act, which calls for judicial interference. We cannot agree with the able and distinguished counsel for the city that "the ordinance attacked and enjoined below amounted only to a direction by the mayor and general council to the ministerial officers of the city to place the orders for public printing with printers using a union label." This ordinance is something more than a mere "direction." It has the form, and was intended to have the effect of law; and, if valid, would, until repealed, bind the members of council as much as it would the subordinate officials of the city. These members could not, with propriety, disregard it so long as they permitted it to stand upon the municipal statute book; and the mere power to repeal it certainly did not prevent its operation on all concerned. If, in the absence of such an ordinance, the contract in question had been let to the Pease company, it could not properly be said that the making of it was an abuse of discretion on the sole ground that the price of the work was too high. It would require an extreme case to justify the courts in setting aside a municipal contract on such a ground, when made under a charter like that of Atlanta. With respect to agreeing on prices, securing good work, prompt service, etc., the municipal discretion must and should be allowed a wide scope; and, when exercised, the courts should be exceedingly slow and reluctant to interfere. Certainly, they should never undertake to substitute their judgment, in matters of judgment, for that of the city's governing authorities.

This Court, in Semmes *vs.* Mayor, etc., 19 Ga. 471, held that "a body corporate is not answerable for an erroneous exercise of a discretion, though the consequences be injurious," and that "inadequacy of price, unless so great as, of itself, to be evidence of fraud, is not a sufficient ground for impeaching" a contract for the sale of property belonging to a city. In Wells *vs.* Mayor, etc., 43 Ga. 67, it was decided that, where a municipal corporation is acting within the scope of its powers, a court will not "interfere to restrain or control its action on the ground that the same is unwise or extravagant," and that, "to sustain such interference, it must appear either that the act is *ultra vires,* or fraudulent,

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or corrupt." Again, in Danielly *vs.* Cabaniss, 52 Ga. 212, it was ruled that "when a town council is authorized by law to do a particular act at its discretion, the courts will not control its discretion, and inquire into the propriety, economy, or general wisdom of the undertaking, or into the details of the manner adopted to carry the project into execution." The case of Mayor, etc., *vs.* Eldridge, 64 Ga. 524, is on the same line, and there are many others in which this court has made decisions of similar import. The doctrine of all these cases, viz., that as a general rule, there should be no judicial interference with the exercise by municipal bodies of the discretion with which they are by law invested, is sound and well recognized; but this rule is not absolutely without exception. The whole subject was given thorough consideration in the case of City of Atlanta *vs.* Holliday, 96 Ga. 546, 23 S. E. 509, in which, after stating that "under the charter of the city of Atlanta the discretion of its municipal authorities, within the sphere of their powers, is very broad, and this discretion is to be exercised according to the judgment of the corporate authorities as to the necessity or expediency of any given measure," it was held that: "Where these authorities are acting within the scope of their duties, and exercising a discretionary power, the courts are not warranted in interfering, unless fraud or corruption is shown, or the power or discretion is being manifestly abused to the oppression of the citizen. In a case where it clearly appears that a threatened act on the part of the municipal authorities will result in such oppression, a court of equity may interfere to prevent the wrong." The vice of the ordinance now under consideration is that it cuts off the power to fully and freely exercise that very discretion which the public good requires the mayor and general council to exercise in making contracts. It effectually ties their hands, and prevents their availing themselves of opportunities to make advantageous agreements in behalf of the city which it is idle to say would not be presented were this ordinance out of the way. We cannot, therefore, escape the conclusion that in adopting this ordinance the mayor and general council exceeded their authority. In 1 Spell. Extr. Relief, Sec. 718, it is said: "Where no conditions or restrictions are imposed upon municipal officers in the matter of letting contracts, they are not obliged to let the work to the lowest bidder, and cannot be enjoined for a refusal to do so, unless guilty of fraud. They may exercise an unlimited discretion so

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long as they are not guilty of gross abuse of discretion, and do not pervert their powers to such an extent as to amount to a fraudulent misappropriation of the public funds." It is interesting, in this connection to notice the case of Avery vs. Job, 25 Or. 512; 36 Pac., 293, in which it was ruled that: "Although the purchase or erection of certain public improvements may have been by the municipal charter confided to the judgment and discretion of the city council, yet equity will at the suit of taxpayers, restrain the council from proceeding in the matter when it is not exercising its discretion, but is arbitrarily wasting the public funds, since such conduct is a gross and manifest abuse of power amounting to a legal fraud on the taxpayers." Here, then we have most respectable authority for the proposition that a municipal act which amounts to a refusal to exercise discretion, and which must result in an arbitrary waste of public funds, "is a gross and manifest fraud amounting to a legal fraud on the taxpayers." Is not such waste sure to occur when, out of nineteen printing concerns in Atlanta, only four are allowed to compete for the city's work, and would not a combination of these four (which could most probably be effected without much difficulty) certainly create a monopoly? If the four should combine, there would be no competition whatever. It was urged in the argument that, if such a thing should occur, the ordinance could and would be speedily repealed. To this we reply that the combination might be made without the knowledge of the municipal authorities; but, aside from this, they ought at all times to be in a position to meet such an emergency without being compelled to resort to further legislation; and further whether such a combination is to be anticipated or not; they have no more right to restrict competition than to defeat it altogether.

The case of Adams *vs.* Brenan, 177 Ill. 194, 52 N. E. 314, 42 L. R. A. 718, is in many respects similiar to the one in hand. It was there held that "a board of education has no power to agree with the representatives of labor organizations to insert in all its contracts for work upon school buildings a provision that none but union men should be employed in such work or placed upon its pay rolls." We make two pertinent extracts from the opinion of Mr Justice CARTWRIGHT: "It is plain that the rule adopted by the board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition, and to increase the cost of work. It is unquestionable

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that, if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should, by a statute, undertake to require this board, as the agency of the State in the management of school affairs in the city of Chicago, to adopt such a rule, or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void, as in conflict with the Constitution of the State. If such a restriction were sought to be enforced by any law of the State, it would constitute an infringement upon the constitutional rights of citizens, so that the State in its sovereign capacity, through its legislature, could not enact such a provision." Pages 199, 200, 177 Ill.; page 316, 52 N. E., and page 720, 42 L. R. A. "There is another ground upon which complainant has an undoubted right to maintain the bill, and that is that the contract tends to create a monopoly, and to restrict competition in bidding for work. The board of education may stipulate for the quality of material to be furnished and the degree of skill required in workmanship, but a provision that the work shall only be done by certain persons or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to lessen competition by preventing contractors from employing any except certain persons, and by excluding therefrom all others engaged in the same work; and such a provision is illegal and void. A taxpayer may resist an attempted appropriation of his money in execution of such a contract." Pages 201, 202, 177 Ill., page 316, 52 N. E., and page 721, 42 L. R. A. In Holden *vs.* City of Alton, 179 Ill., 318; 53, N. E. 556, which was a case of identically the same kind as ours, except that there the city charter required the contracts to be let to the lowest bidders, it was decided that an ordinance like the one now under review was "illegal, as tending to create a monopoly, and impose an additional burden on taxpayers." While, of course, the provision as to letting contracts to the lowest bidders was a matter of consequence, an examination of the opinion, which was delivered by the same justice from whom we quoted above, will leave little room for doubting that the decision would and ought to have been the same, even in the absence of such a provision.

There are, besides the foregoing, numerous other authorities which support our conclusion in the present case. We cite as more or less in point, the following: Beach Monop., Sec. 125;

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2 Beach, Inj., Sec. 1299; City of Chicago *vs.* Rumpff, 45 Ill. 90; Littler *vs.* Jayne, 124 Ill. 123, 16 N. E. 374; Association *vs.* Topeka, 20 Wall. 655, 22 L. Ed. 455; Railroad Co. *vs.* Smith, 29 Ohio St. 292; Van Reipen *vs.* City of Jersey City, 58 N. J. Law, 262, 33 Atl. 740; Oakley *vs.* City of Atlantic City (N. J. Sup.), 44 Atl. 651; Winkler *vs.* Summers (Sup.), 5 N. Y. Supp. 723. Most of the authorities cited in this opinion are also pertinent upon the proposition that in a case like the present the taxpayer has the right to invoke an injunction. Our case of Peeples *vs.* Byrd, 98 Ga. 688, 25 S. E. 677, relied on by counsel for the plaintiffs in error, is in entire accord with what we now decide. There the supreme court reporter was in fact exercising a discretion. Here the corporate authorities sought to put themselves in a place where they could not do so at all, or else within very narrow limits. Judgment affirmed. All the justices concurring.

HOUSE BILL 376—UNION LABEL.

What Are the Provisions of the Bill?—What Does it Mean?—Is it for the Public Good or a Class?—Will it Increase the Cost of the State's Printing?

TO THE MEMBERS OF THE FIFTY-SECOND GENERAL ASSEMBLY—GENTLEMEN:

1. *What Are the Provisions of the Bill?*

That the printing for all the departments and institutions of the State shall bear the "Union Label"—*regardless of cost*—while the Act it proposes to amend requires that contracts "shall be awarded to the *lowest responsible bidder.*"

2. *What Does it Mean?*

It means that all the State printing shall bear a "label" or device which will indicate that the work was done by the representatives of a particular class, and that more than one-half of the citizens of the State engaged in the same business were deprived of the right of bidding, and that *competition was reduced in like proportion.*

3. *Is it for the Public Good or a Class?*

Certainly a class, for not more than 500 people, out of the total population of 2,020,616 in Tennessee, are vitally interested in its passage.

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4. *Will it increase the cost of the State's printing?*

We say yes.

Ask Comptroller King.

Ask Superintendent of Public Instruction Fitzpatrick.

Ask Captain Paine, of Agricultural Department.

Comptroller King, Superintendent Morgan Fitzpatrick, and Commissioner Paine saved the State this year $414.94 by giving their reports to a non-label house. The total cost for this work was $1,315.14. If the allied union label had been required on this printing, the cost would have been $1,730.08. The law that these officials take an oath to support requires them to let the work to the lowest responsible bidder.

Ask the Governor who got the contract for printing his messages; also, the reports of committees, etc., to this General Assembly.

Read the facts in the case of Marshall & Bruce Co. *vs.* City of Nashville.

During the present session of the General Assembly, 1901, the "Union Label" printing establishments of Nashville secured the printing of only one class of the work let out by either House, viz.: printing bills.

This fact illustrates and proves almost conclusively that where these union label establishments come into competition with other establishments their bids are usually so much higher that they seldom secure contracts on work let out to the lowest responsible bidder.

As a further illustration of the truth of the contention that such a law as the one proposed will stifle and defeat competition, to the detriment of the taxpayers, we beg to state that during February, 1901, we were awarded the contract to do a little job of printing for the City of Nashville at the price of $67.50, we being *"the lowest responsible bidders."*

After we had finished and offered to deliver said work to the city, it was refused alone on the ground that it did not bear the "Union Label," there being a city ordinance, like the proposed law, requiring the city printing to bear the "Union Label."

Thereupon, the city readvertised for bids on this identical work. Three bids were made by the only three "label" estab-

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lishments prepared to do this work, one bid being $93.50, one 95.50, one $95.75, and thus it happened that the taxpayers of the city were compelled to pay $93.50 for a job of printing that Marshall & Bruce Co. had offered for $67.50, or 38 per cent more. Bruce Co. had offered for $67.50, or 38 per cent more.

Thereupon, Marshall & Bruce Co. filed their bill to test the validity of said ordinance. This suit is now pending, and its result will settle forever in Tennessee the validity of such legislation either by city councils or State legislatures. If for no other reason this proposed law should be defeated, for the present, at least, rather than pass it, and thereby, in all probability, involve State officials in a multiplicity of lawsuits, when there is now pending a suit against the city of Nashville, as before pointed out, which will settle the very question involved in this proposed law.

Read the following extract from an opinion of Judge Klein, in the case of *The City of St. Louis, Mo., vs Hauessler et al.*, where the city of St. Louis let out the contract for printing a Digest of the City Laws, for the sum of $5,400. Judge Klein said:

"Affidavits tend to show that if the proposals for bids had not restricted the bidding to those firms who are authorized to use the 'label,' at least *one thousand* dollars would have been saved the city."

5. *Is it Constitutional?*

We say no. In support of our position we say that opinions so holding have been handed down by the Supreme Courts of the following States: New York, Pennsylvania, New Jersey, Illinois, Nebraska, Missouri, and Georgia.

6. *In Conclusion.*

To be compelled to conform—not to any law of the land, but to rules and regulations made by a secret organization which cannot be brought into court for any injury it might inflict—deprives us of our freedom to enjoy equal chances in our chosen business, as guaranteed to us by the constitution of the State of Tennessee, and the Federal Constitution as well.

Respectfully,

MARSHALL & BRUCE CO.,
Printers, Taxpayers, and Citizens.

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IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS.

HERMAN A. HAUESSLER, *ET AL.*, Plaintiffs,

vs.

CITY OF ST. LOUIS, CHARLES SCUDDER, TREASURER, AND WOODWARD-TIERNAN PRINTING COMPANY, Defendants.

OPINION OF JUDGE JACOB KLEIN.

The plaintiffs seek an injunction to restrain the Woodward & Tiernan Printing Company from enforcing a contract for printing and binding, made between that company and the register of the city of St. Louis, and to restrain the city and its treasurer from paying any money under the terms of said contract.

The matter is before the Court upon an application for a temporary injunction.

The plaintiffs contend that the contract in controversy is *illegal* and *void,* and this contention is based upon the claim that the contract was made under an illegal ordinance of the city;

That the printing in question must, under the city charter, be let to the lowest bidder;

That it cannot legally be let in any other way; and

That under the ordinance in question, the work cannot be so let, because the ordinance prohibits by implication the acceptance of any bid made by any person not authorized to use the imprint of the "Allied Printing Trades Council of St. Louis, Missouri," the effect of which, it is claimed, is to restrict competition, to create a monopoly, and to grant a special privilege to a favored association or to an arbitrary subdivision to a class of persons.

STATEMENT OF THE CASE.

By the Charter of St. Louis, Article XV., Sec. 1, "All the printing and binding to be done at the expense of the city shall be contracted for" as herein provided. The city register is thereby required to advertise "for sealed bids in writing for doing the city printing to be done, in the city newspapers," and he

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is required to award the printing in every case to the lowest bidder. Afer dealing with this newspaper printing, the section contains the following provision:

"All job printing and binding shall be let by contract, subject to such regulations as may be prescribed by ordinance. Until the contract be made as aforesaid for any authorized printing, at the expense of the city, the same may be contracted for by the register, with the approval of the mayor."

Pursuant to this charter provision, the Municipal Assembly has, by ordinance, prescribed the regulations with regard to the letting of contracts for job printing and binding. Section 1410, Revised Ordinances, 1892, is as follows:

"Section 1410. All job printing and binding shall be let by contract, and with that view the register is required, when the cost of work approximates more than one hundred dollars, and less than two hundred dollars to solicit bids from at least five different parties or firms in the job printing and binding business. When the cost of the work is estimated at two hundred dollars and over, proposals shall be invited by advertisement in the papers doing the city printing.

On July 6, 1898, a further regulation was prescribed by Ordinance No. 19,411, to the effect that "all books and pamphlets and other printed matter in book or pamphlet form shall bear upon the cover or title page thereof the imprint of the 'Allied Printing Trades Council of St. Louis, Missouri.'"

It is alleged in the petition and not denied in any affidavit that has been filed that there exists in the city of St. Louis a voluntary organization known as the Allied Printing Trades Council of St. Louis, Missouri, which has jurisdiction over all the printing trades unions in said city, and that under its constitution, by-laws and regulations no person or corporation is entitled to use the imprint of the label of said organization except such persons and corporations as are engaged in the printing business in the city of St. Louis, and who employ exclusively in every department of their business members of the printing trades unions which are subject to the jurisdiction of said organization.

On the tenth day of April, 1900, the city register advertised in the proper newspapers, a proposal for bids for printing and binding one thousand copies of the Municipal Code of St. Louis, and inserted in the advertisement the following:

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"All of said books shall bear on the cover or title page the imprint of the 'Allied Printing Trades Council of St. Louis, Missouri,' and no bids will be entertained (pursuant to Ordinance No. 19,411, approved July 6, 1898) except from parties who have the right to print on the cover or title page of said books the said imprint."

Under this advertisement, the register received only two bids, and that of the defendant, Woodward & Tiernan Printing Company, was the lower of the two. The register awarded the work to that concern, and entered into a contract in writing with it which makes no reference to the advertisement, or to the sealed proposal, or to the matter of the imprint of the label above mentioned. The contract price for the work is sixty cents per one thousand ems for composition and $2.95 per page to cover all the balance of the cost of the work.

The affidavits filed by the defendants tend to show that this contract price is not in excess of the fair value of the work. The affidavits filed by the plaintiffs tend to show that if the proposal for bids had not restricted the bidding to those firms only who are authorized to use the "label," at least one thousand dollars would have been saved to the city. The affidavits filed by the defendants state that "the use of the union label or imprint does not increase the cost of a good job of such work." The affidavit of Mr. Connolly, the secretary of the Allied Printing Trades Council of St. Louis, states that "the label can be obtained by any and all firms not now using it, *without cost,* the Allied Printing Trades Council supplying it in various sizes and in such quantities as is required upon requisition." This statement should be qualified, as was conceded at the hearing, and as is shown by the other affidavits filed, by the statement that the union label can be obtained only by firms which employ exclusively "union labor" in every department of their business. Mr. Connolly also states that there are only four firms in the city that can produce this work in their own establishment and all of these use the label. The other affidavits show that the A. R. Fleming Printing Company, the Nixon-Jones Printing Company, the August Gast Bank Note and Lithographing Company and the Perrin-Smith Printing Company are each able to produce the work, and neither is authorized to use the label.

Just what the total cost of this work contracted for will be does not appear except by inference from the return made by

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the defendant, the Woodward & Tiernan Printing Company, wherein it is stated that at the institution of this suit nearly one-half of the work had been done and over $2,700 had already been expended in the performance of the contract, from which it may be fairly inferred that the total contract price will exceed $5,400.

APPLICATORY LAW.

From the foregoing statement of the charter and ordinance provisions, it appears that the city register is not in express terms required to let the contract for job printing and binding to the lowest bidder. But the regulations prescribed by Section 1410 of the Revised Ordinances of 1892 must be read in connection with the charter provision as if the same were incorporated in the charter itself. Reading these regulations into the charter provision, it is plain that no contract can be let by the city register for job printing and binding which involves a cost of over two hundred dollars until he has invited proposals for the doing of the work by advertisement in the papers doing the city printing. It is the settled law that when special powers are conferred, or where a special method is prescribed for the exercise and execution of power, this brings the exercise of such power within the purview of the maxim, *Expressio unius,* etc., and by necessary implication, forbids and renders nugatory the doing of the thing required except in the particular way pointed out; and this rule obtains as well in regard to the organic law as to the statutory law. "The familiar principle here announced is tersely uttered by the English Court of Exchequer, in a comparatively recent case, where it is thus expressed: 'If authority is given expressly, upon a defined condition, the expression of that condition excludes the doing of the act authorized under other circumstances than those so defined. * * * Affirmative specification excludes implication.'" Heidelberg *vs.* St. Francois County (1889), 100 Mo. 69, 74; Kolkemeyer & Co. *vs.* City of Jefferson (1898), 75 Mo. App. 678.

It was ruled by the Supreme Court of the United States in French *vs.* Edwards (1871), 80 U. S. (13 Wall.) 506, that statutory requirements intended for the guidance of officers in the conduct of the business devolving upon them and designed to secure order, system and dispatch in proceedings, and by discharge of which the rights of parties interested cannot be injuriously affected, are not usually regarded as mandatory, unless accom-

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panied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But requirements intended for the protection of the citizen, and to prevent a sacrifice of his property, and by disregard of what his rights might be and generally would be injuriously affected, are not directory, but mandatory. The power of the officer in such cases is limited by the manner and conditions prescribed for its exercise

It would seem to be too plain argument that the city register under the provisions of the charter and Section 1410 of the Revised Ordinances of 1892, has no authority to enter into any contract for book and job printing involving more than two hundred dollars in amount without first having invited proposals by advertising. His authority to enter into the contract for job printing is to be exercised after he has invited proposals, for this is the regulation prescribed by the ordinance, which has not been altered or repealed in any way. The regulation is, therefore, a limitation upon his power to contract, and the power to make the contract does not arise until the precedent condition has been observed and complied with. The requirements of an advertisement for proposals is not without its purpose, nor is it to be dispensed with by the public officer of whom it is required, even though he is not bound to let the contract to the lowest bidder. As was said by Judge Ellison in Galbreath *vs.* Newton (1887), 30 Mo. App. 480, 394:

"Notice of the letting of public work or improvements is for the purpose of competition and for safety against the occasional cupidity of public servants, as well, I might add, as for affording all an equal opportunity to obtain the employment the work affords. It is and has been found to be, one of the means of security to the public and justice to the individual. A false notice, a notice not in substantial accord with the fact, is as bad, if not worse, than none at all."

And it was there ruled that where the statute required that sealed proposals shall be received, and that the contract and work shall be let to the lowest responsible bidder, a private letting by the officer is in the face of the statute, and that the statute contemplates reasonable public notice, if none other is prescribed by some general ordinance.

Where a statute or ordinance provides that a public officer who is authorized to make contracts in behalf of a municipal

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corporation shall advertise for sealed proposals, the advertisement is an indispensible requisite to the exercise of such power, for "the law requires that every prerequisite to the exercise of such a power * * * must actually precede its exercise." * * * It is, therefore, clear that it is an indispensible condition precedent to the power of such officer to contract, and there shall be a public letting, in which there is an entire freedom of competition. Mulnix *vs.* Mutual Benefit Life Ins. Co. (1896), 33 L. R. A. 827, 832; 23 Colo. 71; 46 Pac. Rep. 123.

The same point has been ruled many times by our own courts, for we find it laid down in the case of Keane *vs.* Cushing (1884), 15 Mo. App. 96, 101, that an ordinance requiring the board of public improvements to advertise the letting of contracts for public work is mandatory. "It will not do in this case," said the Court, "to say that the ordinance above quoted requiring the board of public improvements to advertise the letting of contracts for public work, is directory merely, and hence that it is immaterial whether the advertisement is made before or after the ordinance takes effect. It is not directory, but mandatory. It is designed to require public notice to be given of the letting of public work, to the end that competition may take place, and that the contract may be made at reasonable prices."

In Clopton *vs.* Taylor (1892), 49 Mo. App. 117, 126, it is said:

"Plaintiff's counsel insist that, since notice is not required by the city charter, it is not essential, and that the ordinance requiring such notice is merely directory. We are not of this opinion. We expressly so ruled in Galbreath *vs.* Newton, 30 Mo. App. 380. See also Keane *vs.* Cushing, 15 Mo. App. 96. Notice of the letting of contract for public work, the cost of which is to be collected from the citizens, *nolens volens,* by special assessment of his property, is certainly a matter which affects the substantial rights of such citizens. When such is the case, there must be a fair compliance with all the conditions precedent, whether prescribed by charter or ordinance. Cole *vs.* Skrainka, 105 Mo. 303."

So, where an ordinance required the city engineer to let public work to the lowest bidder after advertisement for proposals, and the lowest bidder refused to enter into a contract, and thereupon the engineer let the work to the next lowest bidder without a new advertisement, and at different prices than those

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contained in his bid, it was held that the contract made upon such letting was illegal, and it was said by the Court that "an advertisement for new bids in substantial conformity with the re-requirements of the ordinance was a condition precedent to the letting of the contract. (Citing cases.) He (the engineer) could as well let the contract in the first instance, without any advertisement whatever for bids. If, after an acceptance of Tisdale's (the first lowest bidder) bid and his refusal to enter into a contract to do the work, the engineer did not accept the next lowest and best bid (as he did not), the matter of letting of the contract stood precisely as if there had never been an advertisement for bids, or any bid received and accepted. Every step that had been taken in that direction by the engineer, after the passage of the ordinance, was as if the same had not been taken. The private letting to Bingham was, therefore, in utter disregard of the express requirements of the charter and the ordinance passed in conformity thereto." "In that case," the Court continued, "the law has long been settled in this State that such (municipal) corporations are the creatures of the law, established for special purposes, and their acts must not only be authorized by their charters, but these acts must be performed by such officers and agents in such manner as the charter and the ordinances passed in pursuance thereof direct." Guinotte *vs.* Egelhoff (1895), 64 Mo. App. 355, 366.

II.

This brings us to the question whether the invitation for proposals for the doing of the work, with the restrictions therein contained, is or is not in compliance with the regulation prescribed by Section 1410 of the Revised Ordinances of 1892. The answer to this question must depend upon the further question whether Ordinance No. 19,411 is valid or invalid.

The primary test of the validity of every ordinance of the city is that it must be consistent with the constitution and laws of the State and with the provisions of the charter of the city. City Charter, Art. 3 Sec. 26.

Many cases might be cited in which ordinances have been held invalid because they contravene the charter or violate some constitutional rights of the citizen, or are in conflict with some general law of the State.

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Ordinance No. 19,411 attempts to limit public competition for public work. No citizen or person doing business in the State of Missouri, but outside of the corporate limits of the city, can comply with the requirements of said ordinance; and only a limited number of persons engaged in the business of job printing and binding in the city of St. Louis can comply with its terms. It is no answer to this to say that in prescribing that every book and pamphlet printed and bound for the city shall bear on its cover or title page the imprint of a single and exclusive association, the ordinance merely indicates the kind and quality of the work required. Mr. Connolly's affidavit disposes of this claim, for he states that the label can be obtained by any and all persons not now using it, without cost, and that the Allied Printing Trades Council supplies it in various sizes and in such quantities as may be desired, upon requisition. The only condition annexed to the right to use the label is that the firm using it shall employ in every department of its business exclusively persons who are members of some one of the various unions over which the association has jurisdiction.

Every ordinance of the city also must be reasonable and in consolance with common right. The legislative power of the municipal assembly and the mayor of the city is certainly no greater than the legislative power of the General Assembly of the State. If the legislature should undertake to provide by law that persons following some lawful trade or employment should not have the capacity to make contracts, or to receive conveyances, or to build such houses as others are allowed to erect, or in any way make such use of their property as was permissable for others, such act would transcend the bonds of the legislative power, even if it did not come in conflict with express constitutional provisions. The privilege of contracting is both a liberty and a property right, and if A is denied the right to contract and acquire property in a manner which he has hitherto enjoyed under the law, and which right B, C and D are still allowed to enjoy, it will be clear that he is deprived of both liberty and property to the extent that he is denied the right to contract. Due process of law does not mean a statute passed for the purpose of working a wrong on the rights of a person or class. These words are synonymous with the words "law of the land"; and this means general public law, binding upon all the community under all circumstances, and not partial or private laws,

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affecting the rights of private individuals or classes of individuals. Froer *vs.* People (1892), 141 Ill. 171.

It was upon this principle that the Supreme Court of this State declared that the Act of March 6, 1893, prohibiting an employer or other person exercising authority over certain employees from contracting with the latter to withdraw from any trades or labor unions or other lawful organization, or to refrain from joining such organization or from attending an unlawful meeting or assemblage, and forbidding an attempt by any means to compel or coerce any employee into withdrawing from any lawful organization, is violative of Section 30 of Article 2 of the Constitution of the State of Missouri, and the Fifth Amendment of the Constitution of the United States, declaring that no one shall be deprived of life, liberty or property without due process of law, and of Section 1 of Article 14 of the Constitution of the United States, forbidding that any State deprive any person of life, liberty or property without due process of law. And in the same case it was held by the Court that said act is unconstitutional upon the ground of being class legislation, inasmuch as it does not relate to all workingmen, but only to those who belong to some lawful organization or society. And that rights guaranteed to a citizen by the constitution cannot be abridged by legislation under the guise of police regulations. State *vs.* Julow (1895), 129 Mo. 163.

There can be no liberty protected by government that is not regulated by such law as will preserve the right of each citizen to pursue his own advancement and happiness in his own way, subject only to the restraints necessary to secure the same right to all others. The fundamental principle upon which such liberty is based is equality under the law of the land. Liberty, as that term is used in the Constitution, means not only freedom from servitude, but embraces the right of every man to be free in the use of his powers and faculties, and to adopt and pursue such vocation or calling as he may choose, subject only to the restraints necessary to secure the common welfare. Braceville Coal Co. *vs.* People (1893), 147 Ill. 66.

In Adams *vs.* Brennan (1898), 177 Ill. 194, 52 N. E. Rep. 314, the board of education of the city of Chicago entered into a contract with an organinzation in said city known as the Building Trades Council, representing labor trades union in said city,

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by which the board of education on its part agreed to insert in all contracts for work upon school buildings a provision that none but union labor should be employed and placed upon the pay-rolls of said board. The Bryant School, one of the school-houses under the care of the board, being in need of repair, the board advertised on February 5, 1898, for bids for the construction of a roof on an addition thereto, which advertisement contained the following:

"*Notice.*—None but union labor shall be employed on any part of the work where said work is classified under any existing union, by order of the Board of Education."

A bid was made by a contractor in which he stated that he would do the above work for the sum of $1,900, provided all conditions as to the employment of none but union labor are stricken from the specifications, and contract made accordingly. But if this restriction were retained in the contract, he offered to do the work for $2,090. The contract was made by the board to him for the sum of $2,090, with the restriction, and a suit was brought to restrain the parties from carrying out the contract. Upon the filing of the bill application was made for a preliminary injunction, which was heard upon the bill and affidavits, and the record of proceedings of the board of education. The application was denied and the lower court dismissed the bill for want of equity appearing on its face. The Supreme Court reversed the judgment and held that the rule adopted by the board and included in this contract is a discrimination between different classes of citizens, and of such a nature as to restrict competition and increase the cost of work. "It is unquestionable," said the Court, "that if the legislature should enact a statute containing the same provision as this contract in regard to any work to be done for boards of education, or if they should by a statute undertake to require this board, as the agency of the State in the management of school affairs in the city of Chicago, to adopt such a rule or insert such a clause in its contracts, or should undertake to authorize it to do so, the provision would be absolutely null and void, as in conflict with the constitution of the State. If such a restriction were sought to be enforced by any law of the State, it would constitute an infringement upon the constitutional rights of citizens, so that the State, in its sovereign capacity through its legislature, could not enact such a provision. (Citing cases.) There is no more reason or justification for such a con-

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tract as this, than there would be for a provision that no one should be employed except members of some particular party or church. In any such case, it might be said that the board entertained a *bona fide* opinion that the members of some political party were more intelligent and better capable of performing the work, so that better results would be obtained; or that the members of a church, on account of their higher standard of morality, would more faithfully and conscientiously carry out the contract. The fact that the board may have been of the opinion that its action was for the benefit of the public cannot afford a justification for limiting competition in bidders and requiring them to abandon the right to contract with whomsoever they may choose for the performance of the work."

In that case, as in the present, it is urged that although the board of education could not be lawfully authorized to make such a contract, it might have some sort of discretion to do so; but it was ruled that the only question in the case on the subject of the validity of such contract is whether the board possesses power beyond that of the legislature, in which is vested the entire legislative authority of the State. And that there could be no greater power in the board to act of its own motion than by virtue of positive law. "The board of education," said the Court, "may stipulate for the quality of material to be furnished, and the degree of skill required in workmanship, but a provision that the work shall only be done by certain persons or classes of persons, members of certain societies, necessarily creates a monopoly in their favor. The effect of the provision is to limit competition by preventing contractors from employing any except certain persons and by excluding therefrom all others engaged in the same work, and such a provision is illegal and void." It was also ruled that a tax-payer may resist an attempted appropriation of his money in execution of such a contract.

Substantially to the same effect is the case of Holden *vs.* City of Alton (1899), 179 Ill. 318, where an ordinance of the city of Alton required all contracts for city printing to be awarded to union shops only, or to such as are able to show the union label; and it was held that the ordinance was illegal, as tending to create monopoly and impose additional burbens on tax-payers, who are entitled under the charter of that city to have such contracts let to the lowest bidder. The only distinction be-

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tween that case and the present is that here there is no express provision that the contract shall be let to the lowest bidder, as in that case. A municipal corporation has no authority to enter into a combination with a certain class of persons doing printing to restrict the privilege of bidding to such class instead of leaving it open to all citizens upon like conditions. Such a combination or agreement is in violation of common right, tends to create a monopoly, and cannot be tolerated. But the same result must follow, whether the contract is to be let to the lowest bidder or not. There is nothing in the charter of the city of St. Louis, nor in the constitution of the State, nor in any statute of the State, which authorizes the municipal assembly to provide that contracts for the doing of job printing and binding shall only be made to particular persons or associations of persons. There is an utter lack of authority, and his lack of authority renders Ordinance No. 19,411 illegal and void.

In the case of Elliott *vs.* City of Pittsburg (1897), 6 Pa. Dist. R. 455, it appeared that the city council of the city of Pittsburg passed an ordinance entitled "An Ordinance Relating to Bids for Building Contracts Hereafter to be Awarded by the City of Pittsburg," in which it was provided that "Before such bids shall be deemed valid and be entitled according to law to award thereon of contracts by the city of Pittsburg, they shall contain, signed by the bidder, the following clauses:" among which were "that the bidder, as contractor, will not employ or authorize or supply to be employed by any person, by, through or under him, in any manner whatsoever, any person except persons belonging to the organizations approved by the Building Trades Council of Pittsburg, of the crafts or trades appertaining to the work to be done by the persons employed respectively under the terms and provisions of the contract so awarded," and also, "that failure by the bidder to comply with the above condition shall authorize the director of the department of the city government having charge of such contract to forfeit the same and to complete the work contemplated in such contract at the cost of the bidder, and to hold the bidder and his sureties responsible to their respective original liability, as well as for any extra cost that may be incurred by reason of forfeiture and completion of said contract by such director." It was held that the city has no right to say that the Building Trades Council of Pittsburg, and they only, shall designate the workmen who may be employed in any

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city work, and thus limit the contract to employ only a certain class of workmen, without regard to qualifications, and it was held, further, that such ordinance prevented free and open competition as required by the act of the legislature; and, further, that the provision of the ordinance authorizing the director of the department of the city government having charge of the contract to forfeit the same upon a violation of the ordinance is unreasonable and oppressive, well calculated to deter bidders and to be injurious to the city and places the contract at the mercy of the director, and therefore that such ordinance is illegal and beyond the powers of the council.

These cases sufficiently indicate the trend of the authorities upon this matter. The question here is not a question as to the quality of the work or the specific kind of material to be employed in this work. It is, therefore, not a case analogous to the case where a municipal officer, having authority to designate the kind of material that shall be used in the construction of a street, may designate a patented article which has been found advantageous for such use.

III.

Section 1410 of the Revised Ordinances of 1892 is not repealed by Ordinance No. 19,411 in express terms, but the two ordinances are in conflict with each other, for the first provides that the city register shall advertise for bids without any limitation upon the bidding, whereas the second ordinance undertakes to limit the bids to a certain class, or rather, to a part of a class.

The second ordinance being in conflict with the first, and the first not having been expressly repealed, the second ordinance cannot be held to be effectual for any purpose, because the charter of the city provides that no special or general ordinance which is in conflict or inconsistent with general ordinances of prior date shall be valid or effectual until such prior ordinance or the conflicting part thereof are repealed by express terms.

CITY CHARTER, ARTICLE 3, SECTION 28.

IV.

With respect to the effect of the contract made between the city register and the Woodward & Tiernan Printing Company under the circumstances as shown above, it is apparent that be-

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fore such contract could be made there must have been an advertisement in substantial conformity with Section 1410 of the Revised Ordinances of 1892. An advertisement, the effect of which is necessarily to limit the free competition for the work which the law contemplates that the public shall have the advantage of, is no advertisement at all. In this case the city register in express terms in the advertisement, acting under the supposed authority of Ordinance 19,411, stated that no bids would be entertained except from parties who have the right to print on the cover or title page of the books the imprint of the Allied Printing Trades Council of St. Louis, Missouri. We have seen what the effect of this restriction must have been. As is said in a case already cited, "a false notice, a notice not in substantial accord with the fact, is as bad, if not worse, than none at all." Galbreath *vs.* Newton (1887), 30 Mo. App. 380, 394.

Hence the register by inserting the restriction above mentioned in the advertisement in question, although he supposed himself authorized to insert such restriction by virtue of Ordinance 19,411, acted beyond the scope of his authority. An advertisement in substantial compliance with Section 1410 was necessary before he was entitled to make any contract with the defendant printing company. Guinotte *vs.* Egelhoff (1895), 64 Mo. App. 356, 366.

If the Register had no power to make the contract the contract made by him must be regarded as void, and such seems to be the result in all the cases bearing on this matter decided by the courts.

V.

It is suggested that the defendant, the Woodward & Tiernan Printing Company, has innocently proceeded in the performance of the contract made between it and the city register, and has expended over $2,700 in part performance of that contract, and it is claimed that this circumstance should deter the Court from restraining the city from paying out any money under the contract even though it is illegal. This same contention has many times been made to the Courts, each time with the same result. The general rule controlling the matter is tersely stated by Judge Sherwood in Cheeney *vs.* Inhabitants of the Town of Brookfield (1875), 60 Mo. 53, 54: "Those who deal with the officers of a

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corporation must ascertain at their peril what they will, indeed, conclusively be presumed to know, that these public agents are acting strictly within the sphere limited and prescribed by law, and outside of which they are utterly powerless to act."

One contracting with a city through its officers is bound to take notice at his peril of their powers, and also of the legality of its ordinances. Keating *vs.* City of Kansas (1884), 84 Mo. 415; Kolkmeyer *vs.* City of Jefferson (1898), 75 Mo. App. 685; Mister *vs.* City of Kansas (1885, 18 Mo. App. 217.)

The suggestion made that to hold this contract void would operate as a great hardship upon the printing company is fully met in the cases just cited; and in the case of Kolkmeyer *vs.* City of Jefferson, *supra,* it is said by the Court that were it not for the fact that the contractor must be presumed to have known of the want of authority in the city officers to enter into the contract for the work which the contractor did under such contract, and which was not made in conformity with the requirements of the law, the case might be regarded as one of great hardship; but the fact that it might operate as a hardship could not be considered by the Court. The same suggestion was met by the Supreme Court in the case of Keating *vs.* City of Kansas, *supra,* where it was said that the requirements of the charter (and for that purpose the requirements of the ordinances must be considered the same) in such cases is the only touchstone of corporate liability. Upon that the contractor with the city must rely. To establish any rule in order to meet the hardships of this particular case would result in incalculable mischief and the overthrow of the organic law of the city. And it is further held in that case that if the contract with the city was void, it would give no right of action to the contractor; for, from a void contract, no cause of action can arise, whether of *quantum meruit* or one sounding in damages.

The contract having been entered into without an observance of those limitations put upon the public officer with reference to the matter, the city cannot be regarded as bound thereby, and the contract itself cannot be regarded as merely voidable, but must be regarded as wholly void. And this the printing company is conclusively held to have known at the time it entered into the contract, and at the time it performed the work which appears to have been performed by it under the terms of the contract. The city has not yet received the benefit of this work, and the authori-

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ties above cited are to the effect that even though the city had received the work, still it could not be compelled to pay therefor, because no legal contract for doing the work had been made.

VI.

It was suggested at the hearing that no one was prevented from bidding for this work by reason of the restriction contained in the advertisements inviting proposals, and that all persons desiring to bid, whether they could use the imprint of the label of the Allied Printing Trades Council of St. Louis or not, might have tendered their bid and possibly have obtained the contract from the city register. It is a sufficient answer to this to say that inasmuch as the advertisement itself was without effect because it was not in substantial conformance with the requirements of the law, no contract made in pursuance of the advertisement, even though it had been made with some one other than those entitled to use the label, would have been valid, because an advertisement made in substantial conformity to the law was the prerequisite to a valid contract, and, as we have seen, there was no valid advertisement in this case.

VII.

It is urged by the learned city counsellor that the Court should not interfere by injunction in this case, because of the inconvenience which will result to the city and its various officers from a further delay in the publication of the Municipal Code. The rule of equity under which the Court, upon an application for a temporary injunction, will take into consideration the comparative convenience and inconvenience to the respective parties of granting or witholding the injunction in the particular case is often applied; but it has never been applied for the purpose of permiting an illegal thing to be accomplished. There may be some inconvenience occasioned by the delay in the printing of the Municipal Code, but this inconvenience is not to be compared with the destruction of the positive requirements of the law controlling the action of municipal officers in the case. As Judge Sherwood said in the Keating case, "To establish any rule in order to meet the hardships of this particular case," and it might be added, to meet the inconvenience of the city in this particular case, "would result in incalculable mischief, and in the overthrow of the law itself."

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VIII.

It will not be necessary in this case for the present to go beyond granting a restraining order against the city of St. Louis and the city treasurer, restraining and enjoining them until the further order of the Court from paying out any money under the contract in controversy in this case. If the printing company is advised that it will be safe for it to go on with the printing of the Municipal Code under the contract in question, there is no reason why the Court should interfere with its doing of the work; but inasmuch as the city authorities would in all probability pay out the money before the final determination of this case unless they are restrained from doing so, it will be ordered by the Court that the city of St Louis, and Charles Scudder, the treasurer thereof, be restrained until the further order of the Court from paying any sum of money to the defendant, Woodward & Tiernan Printing Company, under and by virtue of the terms of the contract in question, upon the giving of a bond in the sum of two thousand five hundred dollars.

JACOB KLEIN.

June 16, 1900.

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SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1903.

W. W. ATKIN, Plaintiff in Error,

vs.

THE STATE OF KANSAS.

In Error to the Supreme Court of the State of Kansas.

[November 30th, 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

This case involves the validity under the Constitution of the United States of the statute known as the eight-hour law of Kansas of 1891, *c.* 114, being sections 3827, 3828 and 3829 of the General Statutes of 1901 of that State.

By the first section of that act it was provided that:

"Eight hours shall constitute a day's work for all laborers, workmen, mechanics or other persons now employed, or who may hereafter be employed by or on behalf of the State of Kansas, or by or on behalf of any county, city, township or other municipality of said State except in cases of extraordinary emergency which may arise in time of war, or in cases where it may be necessary to work more than eight hours per calendar day for the protection of property or human life: provided, that in all such cases the laborer, workmen, mechanics or other persons so employed and working to exceed eight hours per calendar day shall be paid on the basis of eight hours constituting a day's work: provided further, that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics and other persons so employed by or on behalf of the State of Kansas, or any county, city, township or other municipal of said State; and laborers, workmen, mechanics and other persons employed by contractors or sub-contractors in the execution of any contract or contracts within the State of Kansas, or within any county, city, township or other municipality thereof shall be deemed to be employed by or on behalf of the State of Kansas or of such county, city, township or other municipality thereof."

The second section declared that:

"All contracts hereafter made by or on behalf of the State of Kansas, or by or on behalf of any county, city, township or other municipality of said State, with any corporation, person

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or persons, for the performance of any work or the furnishing of any material manufactured within the State of Kansas, shall be deemed and considered as made upon the basis of eight hours constituting a day's work; and it shall be unlawful for any such corporation, person or persons to require or permit any laborer, workman, mechanic or other person to work more than eight hours per calendar day in doing such work or in furnishing or manufacturing such material, except in the cases and upon the conditions provided in Section 1 of this Act."

The third section makes any officer of Kansas, or of any county, city, township or municipality of that State, or any person acting under or for such officer, or any contractor with the State, or any county, city, township or other municipality thereof, or other person violating any of the provisions of the act, liable for each offense,, and subject to be punished by a fine of not less than $50 nor more than $1,000, or by imprisonment not more than six months, or both fine and imprisonment, in the discretion of the Court.

It may be stated that the act exempts existing contracts from its provisions.

The present prosecution was under the above Act, and was commenced in one of the courts of Kansas.

The complaint in its first count charged that Atkin contracted with the municipal corporation of Kansas City to do the labor, and furnish all materials for the construction of a brick pavement upon Quindaro Boulevard, a public street of that city; and having hired one George Reese to shovel and remove dirt in execution of the work, did knowingly, wilfully and unlawfully permit and require him to labor ten hours each calendar day upon said work, there being no extraordinary emergency arising in time of war, nor any necessity for him to labor more than eight hours per day for the protection of property or of human life.

The second count contained the same allegations as to the general nature of Atkin's contract, and charged that he unlawfully hired Reese to labor on the basis of ten hours as consituting a day's work by contracting to pay the current rate of wages, which in that locality was the sum of $1.50 per day, and unlawfully exacted and required of him that he labor ten hours each calendar day in order to be entitled to the current wages of $1.50 per day, there being no extraordinary emergency arising in time

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of war, nor any necessity for him to labor more than eight hours for the protection of property or of human life.

The defendant moved to quash each count, upon the grounds, among others, that the statute in question, in violation of the first section of the Fourteenth Amendment to the Constitution of the United States, deprived him of his liberty and property without due process of law and denied him the equal protection of the laws.

The motion to quash was overruled, and the case was heard upon an agreed statement of facts.

It appears from the statement that the parties stipulated, for the purposes of the case, that Kansas City was under a duty to keep its streets and highways in repair, and make all contracts to grade and pave them and for all other public improvements within its limits; that the defendant entered into a contract with the city to construct a pavement on Quindaro Boulevard, a public highway in that city, and employed among others, one George Reese to perform the labor of shoveling and removing dirt in the prosecution of that work; permitted him to work more than eight hours on each calendar day, although there was no extraordinary emergency arising in time of war, nor any necessity that he or any other person engaged on the work should work more than eight hours for the protection of property or human life; that the agreement with Reese was to pay fifteen cents per hour and no more, the current rate of wages for such work in that locality being $1.50 for ten hours' labor per day; and that the defendant exacted and required of him that he work ten hours each calendar day in order to be entitled to the current wages of $1.50 per day; that if the contractor had been compelled to pay Reese and other laborers at the rate of $1.50 per day for eight hours' work, his compensatinon would have been diminished by one hundred dollars; that Reese was not compelled, required or requested to work more than eight hours in any one day, but did so voluntarily, and was permitted and allowed to work ten hours in each calendar day in order to earn $1.50 in a calendar day; that he was employed at his own solicitation, and entered into the agreement with Atkin freely, and worked at the time and place mentioned in the complaint with the knowledge, consent and permission of defendant; that it was not the intention, expectation, desire or agreement of Reese or of the defendant that the

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former should ask, demand or receive the same compensation for eight hours' work as was paid for ten hours' work each calendar day to laborers doing the same kind of work for persons having contracts with private persons or corporations; that he was hired and employed without the knowledge or consent of the city, and neither the city nor its officers, had or exercised any control or supervision over him, he being the servant of the defendant and not of the city; and, that the contract between the defendant and the city did not contain any provision as to the number of hours laborers should work in a calendar day, nor any provision as to their compensation, but left the contractor free as to the means and manner of performing his contract.

It was also stipulated that the labor performed by Reese was healthful out door work, not dangerous, hazardous or in any way injurious to life, limb or health, and could be performed for a period of ten hours during each working day of the week without injury from so doing, and that the labor he was employed to perform, and did perform, was "in no respect or manner more dangerous to the health or hazardous to life or limb or to the general welfare of the said George Reese or other persons doing such work than the labor performed by persons doing the same kind of or character of work as the employes *or* [of] contractors having contracts to do the same kind of work for private persons, firms or corporations, or as the servants of private persons, firms or corporations."

It was further stipulated that the work of shoveling and removing dirt in the construction of a pavement was in all respects the same whether the pavement be constructed for a city or other municipality or for a private person, firm or corporation.

Such was the case presented for the determination of the trial court.

The prosecution resulted in a judgment against the defendant, and he was sentenced to pay a fine of fifty dollars on each count of the complaint. Motions in arrest of judgment and for new trial having been denied, the case was taken to the Supreme Court of Kansas, which affirmed the judgment and sustained the validity of the statute.

The case has been stated quite fully, in order that there may be no dispute as to what is involved and what not involved in its determination.

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No question arises here as to the power of a State, consistently with the Federal Constitution, to make it a criminal offense for an employer in purely private work in which the public has no concern, to permit or to require his employees to perform daily labor in excess of a prescribed number of hours. One phase of that general question was considered in Holden *vs.* Hardy, 169 U. S. 366, in which it was held that the Constitution of the United States did not forbid a State from enacting a statute providing—as did the statute of Utah there involved—that in all underground mines or workings and in smelters and other institutions for the reduction or refining of ores or metals, the period of the employment of workmen should be eight hours per day, except in cases of emergency when life or property is in imminent danger. In respect of that statute, this Court said: "The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts. While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases, generated by the processes of refining or smelting."

As already stated, no such question is presented by the present record; for, the work to which the complaint refers is that performed on behalf of a municipal corporation, not private work for private parties. Whether a similar statute, applied to laborers or employees in purely private work, would be constitutional, is a question of very large import, which we have no occasion now to determine or even to consider.

Assuming that the statute has application only to labor or work performed by or on behalf of the State, or by or on behalf of a municipal corporation, the defendant contends that it is in conflict with the Fourteenth Amendment. He insists that the

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Amendment guarantees to him the right to pursue any lawful calling, and to enter into all contracts that are proper, necessary or essential to the prosecution of such calling; and that the statute of Kansas unreasonably interferes with the exercise of that right, thereby denying to him the equal protection of the laws. Allgeyer *vs.* Louisana, 165 U. S. 578; Williams *vs.* Fears, 179 U. S. 270. In this connection, reference is made by counsel to the judgment of the Supreme Court of Kansas in Ashby's case, 60 Kan. 101, 106, in which that said: "When the eight-hour law was passed the legislature had under consideration the general subject of the length of a day's labor, for those engaged on public works at manual labor, without special reference to the purpose or occasion of their employment. The leading idea clearly was to limit the hours of toil of laborers, workmen, mechanics, and other persons in like employments, to eight hours, without reduction of compensation for the day's services."

"If a statute," counsel observes, "such as the one under consideration is justifiable, should it not apply to all persons and to all vocations whatsoever? Why should such a law be limited to contractors with the State and its municipalities?******Why should the law allow a contractor to agree with a laborer to shovel dirt for ten hours a day in performance of a private contract, and make exactly the same act under similar conditions a misdemeanor when done in the performance of a contract for the construction of a public improvement? Why is the liberty with reference to contracting restricted in the one case and not in the other?"

These questions—indeed, the entire argument of defendant's counsel—seem to attach too little consequence to the relation existing between a State and its municipal corporations. Such corporations are the creatures, mere political subdivisions, of the State for the purpose of exercising a part of its powers. They may exert only such powers as are expressly granted to them, or such as may be necessarily implied from those granted. What they lawfully do of a public character is done under the sanction of the State. They are, in every essential sense, only auxiliaries of the State for the purposes of local government. They may be created, or, having been created, their powers may be restricted or enlarged, or altogether withdrawn at the will of the legislature, when restricting or withdrawing such powers, being subject only to the fundamental condition that the collective and individual rights of the people of the municipality shall not thereby be de-

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stroyed. Rogers *vs.* Burlington, 3 Wall. 654, 663; United States *vs.* Railroad Company, 17 Wall. 322, 328-9; Mount Pleasant *vs.* Beckwith, 100 U. S. 514, 525; State Bank of Ohio *vs.* Knoop, 16 How. 369, 380; Hill *vs.* Memphis, 134 U. S. 198, 203; Barnett *vs.* Denison, 145 U. S. 135, 139; Williams *vs.* Eggleston, 170 U. S. 304, 310. In the case last cited we said that "a municipal corporation is, so far as its purely municipal relations are concerned, simply an agency of the State for conducting the affairs of government, and as such it is subject to the control of the legislature." It may be observed here that the decisions by the Supreme Court of Kansas are in substantial accord with these principles. That Court, in the present case, approved what was said in City of Clinton *vs.* Cedar Rapids & Missouri River R. R. Co., 24 Iowa, 455, 475, in which the Supreme Court of Iowa said:

"Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere tenants at the will of the legislature."

See also *In re* Dalton, 61 Kans. 257; State *ex rel. vs.* Lake Koen Company, 63 Kans. 394; State *ex rel. vs.* Com'rs of Shawnee Co., 28 Kans. 431, 433; Mayor &c., *vs.* Groshon, 30 Md. 436, 444.

The improvement of the boulevard in question was a work of which the State, if it had deemed it proper to do so, could have taken immediate charge by its own agents; for, it is one of the functions of government to provide public highways for the convenience and comfort of the people. Instead of undertaking that work directly, the State invested one of its governmental agencies with power to care for it. Whether done by the State directly or by one of its instrumentalities, the work was of a public, not private, character.

If, then, the work upon which the defendant employed Reese was of a public character, it necessarily follows that the statute in question, in its application to those undertaking work for or on behalf of a municipal corporation of the State, does not infringe

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the personal liberty of any one. It may be that the State in enacting the statute, intended to give its sanction to the view held by many, that, all things considered, the general welfare of employees, mechanics and workmen, upon whom rest a portion of the burdens of government, will be subserved if labor performed for eight continuous hours was taken to be a full day's work; that the restriction of a day's work to that number of hours would promote morality, improve the physical and intellectual condition of laborers and workmen and enable them the better to discharge the duties appertaining to citizenship. We have no occasion here to consider these questions, or to determine upon which side is the sounder reason; for, whatever may have been the motives controlling the enactment of the statute in question, we can imagine no possible ground to dispute the power of the State to declare that no one undertaking work *for it or for one of its municipal agencies,* should permit or require an employee on such work to labor in excess of eight hours each day, and to inflict punishment upon those who are embraced by such regulations and yet disregard them. It cannot be deemed a part of the liberty of any contractor that *he* be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the State. On the contrary, it belongs to the State, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities. No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.

If it be contended to be the right of every one to dispose of his labor upon such terms as he deems best—as undoubtedly it is—and that to make it a criminal offense for a contractor for public works to permit or require his employee to perform labor upon that work in excess of eight hours each day, is in derogation of the liberty both of employees and employer, it is sufficient to answer that no employee is entitled, of absolute right and as a part of his liberty to perform labor for the State; and no contractor for public work can excuse a violation of this agreement with the State by doing that which the statute under which he proceeds distinctly and lawfully forbids him to do.

So, also, if it be said that a statute like the one before us is mischevious in its tendencies, the answer is that the responsibility

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therefore rests upon legislators, not upon the courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere asigned to it by the foundamental law, should enter into the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizens against merely arbitary power. That is unquestionably true. But it is equally true—indeed, the public interests imperatively demand—that legislative enactment should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation, of the fundamental law of the Constitution. It cannot be affirmed by the statute of Kansas that it is plainly inconsitent with that instrument; indeed its constitutionality is beyond all question.

Equally without any foundation upon which to rest is the proposition that the Kansas statute denied to the defendant or to his employee the equal protection of the laws. The rule of conduct prescribed by it applies alike to all who contract to do work on behalf either of the State or of its municipal subdivisions, and alike to all employed to perform labor on such work.

Some stress is laid on the fact, stipulated by the parties for the purposes of this case, that the work performed by defendant's employee is not dangerous to life, limb or health, and that daily labor on it for ten hours would not be injurious to him in any way. In the view we take of this case, such considerations are not controlling. We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the State and its municipal agents acting by its authority, it is for the State to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights of others; and that has not been done.

The judgment of the Supreme Court of Kansas is affirmed.

The CHIEF JUSTICE, Mr. Justice BREWER and Mr. Justice PECKHAM dissent.

True copy.

Test:

Clerk Supreme Court, U. S.

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Appellate Division Reverses Order of Lower Court in the Matter of the John Single Paper Co. vs. the Board of Supervisors of Onondaga County.

SYRACUSE, N. Y., May 5, 1906.—By decision of the Appellate Division of the Supreme Court, handed down at Rochester yesterday, the John Single Paper Company wins its fight against the Board of Supervisors of Onondaga County. The action involved the award of a contract for printing.

The Appellate Division reversed the order of the lower court, which was in favor of the supervisors, with $10 costs and disbursements, and granted a writ, with $10 costs, compelling the supervisors to approve the bond presented by the Single Company.

The opinion was rendered by Justice SPRING and Justices WILLIAMS and NASH concur.

The case was argued at the last term of the Appellate Division by Hopkins & Howlett for the paper company and William L. Barnum for the supervisors.

Appeal was taken from Justice William S. Andrews' refusal to grant a writ of peremptory mandamus to the Single Company in its suit against the supervisors. The supervisors in the December session, 1905, called for bids for the public printing, and specified that all bidders should agree to use the union label. The Single Company submitted the lowest bid, but was ignored because it would not unionize its shop.

The company's application for a writ was based on the contention that the requirements exacted by the supervisors was a restraint on trade, illegal, void and tending to a waste of the county's funds.

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The Union Label is an annoyance to users of printed matter. Its use is an affront to an overwhelming majorty of citizens.

Following are a few opinions culled at random from the daily press:

"The intolerable annoyance to which local merchants and business men generally, not to mention the politicians and candidates for office, are just at present being subjected through the thinly-disguised threats of a union boycott if the so-called union label is not affixed to every bit of printing, seems to call for some plain words.

"The International Typographical union called a strike in every one of the principal printing establishments of Grand Rapids, ostensibly for the eight-hour day. In reality it was a strike to take away from the employing printer the control of the business by so surrounding the conditions of employment in the shop with restrictions and coercion that the proprietor found the last vestige of control had been taken from him. In other words, it was a strike for the closed shop—intended to fasten upon the employer and the industry still more closely the chain of union domination, calculated and distinctly intended to run the business wholly from the union standpoint. James M. Lynch, president of the International Typographical union, specificially stated to the Grand Rapids employing printers, when he was in this city, that this was a battle to the finish for a control of the business, and that the demands of the I. T. U., no matter how intolerable morally, and no matter how impossible from an economic standpoint, would never cease until the employers were "sticking the type" and the employes were "riding in the carriages."

"The employing printers and their friends thoroughly understood this, and they have been fighting from the drop of the hat to defend their rights—those rights supposed to be sacred, and to be guaranteed to them under the constitution of the United States. They have had the support of their customers, many of whom have had their own experience with militant trades unions in their own crafts, and the rest of whom will have their own outrageous and humiliating experience with it if a stand—by all for each and each for all—is not made now.

"The employing printers of Grand Rapids have demonstrated the absolute falsity of the cardinal plank in the union platform, that an adequate supply of thoroughly competent and experienced workmen could not be secured outside of the ranks of the union. Every printing office struck last September is now, and has been for some time, adequately manned, and is turning out work in greater quantity, and fully equal in quality, to that put out from the same institutions when run as closed shops. Furthermore,

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the wages paid average higher—because with the "levelling down" burden of the union removed, the incentive to individual effort has been restored in every shop, and those who demonstrate that they are earning more than others are receiving more.

"Fairly and squarely and thoroughly defeated in their strike in Grand Rapids, the ex-employes of the several shops are now seeking to drag the merchants and business men into the controversy, by demanding the use of the union label on all their printing, with the intimation, of course, that the patronage of all union men will be withdrawn unless this is done. This is a cowardly, contemptible attack—for it can be construed in no other light—on the merchants and business men thus sought to be influenced. The merchant should have the same right to purchase his printing wherever he pleases that the individual has to buy his groceries, or his clothes, or his cigars. If the merchant must make his purchases at the dictation of the union, it is logical that he be equally restricted in selling his merchandise. If the union can censor his sources of supply, it can—and surely will—go a step farther and censor his list of customers; he must not sell to any one who does not present a union card. The "closed store" will as surely follow the establishment of the closed shop as the night the day.

"The merchants and business men of Grand Rapids cater to all classes and conditions; they do not ask whether a prospective customer is married or single, Methodist or Catholic, democrat or republican. Why should they be asked or expected to deliberately affront an overwhelming majority of their customers, who in the very nature of things are not union men or women, by ostentatiously proclaiming that they never patronize the open shop—and all to help bolster up a lost cause?

"The union label is a blot upon the fair escutcheon of true Americanism. Nothing more or less than a form of blackmail levied upon unthinking employers, compelling them not only to pay tribute to the treasury of the union by the purchase of these labels, but to sustain one of the most atrocious systems ever invented. It is a direct reflection upon the character of any person sanctioning its use, for it is an acknowledgement of being a party to an unlawful contract, that of the closed shop.

"The merchant or the business man who is approached by the emissaries of the closed shops with the request or the demand that he use the union label on his printing, should fully understand what a compliance with that request means, not only from a business, but from the standpoint of good citizenship. In the first place it means in Grand Rapids a curtailment of opportunity and the practical elimination of competition. There are in this city at present, excluding the one-man shops, 26 book and job printing establishments. Of these, 19 are run on the open shop

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basis, and seven as closed shops, that is, using the union label imprint on their product. The assessed valuation of all the open shops, as fixed by the board of assessors last year, is $204,550; of the closed shops, $17,050. That is to say, THE OPEN SHOPS CONTRIBUTED 92.3 PER CENT. OF ALL THE TAXES PAID BY THE PRINTING INDUSTRY IN GRAND RAPIDS.

"The open shops today have in all departments of their business 581 persons against 52 in all departments of the closed shops. In other words, THE OPEN SHOPS OF GRAND RAPIDS EMPLOY 91.7 PER CENT. OF ALL LABOR AT PRESENT ENGAGED IN THE PRINTING INDUSTRY IN GRAND RAPIDS.

"Does any business man believe he can afford to tie up to 7.7 of the job printing capacity of the city, to the exclusion of the other 92.3 per cent? Do the politicians think the caudal appendage is able to vibrate the canine all the time.

"That for the business aspect of the union printing label in Grand Rapids. To ask for the label, or indeed, to use the label exclusively on one's printed matter, is in effect the declaration of a boycott against more than 90 per cent. of the individuals engaged in the printing business in Grand Rapids. Was it unreasonable for the employing printers, paying more than 90 per cent. of the taxes assessed on the industry, to insist that the emblem of the boycott against their business should not appear on the public ballots?

"Now, from from the standpoint of good citizenship—of patriotism—what are the chief tenets of the International Typographical union? What does it stand for that should induce any citizen to strain a point in its favor, as against the individuals? Its members, many of them, are intelligent, honest, self-respecting men, who, as individuals, are, and should be, respected. But they have elected to join a pody which strips the individual of his personal judgment, making him a brainless puppet, live and breathe and have his being within an organization that has placed its demands above that of home, religion and the state."

A PARABLE OF THE GOLDEN GATE.

At the gateway of the devastated city stood a woman, her garments torn and disordered, her flesh bruised and bleeding, but in her eyes the light of pride and strength and determination. To all the children of men she spoke:

"I am struck down by the power that no man can measure. My children suffer for bread and cry for shelter. The homes that covered them are gone. The fields that fed them are desolated."

Then from every man came quick answer. From mansion and from hovel, from the old and from the young, from the rich

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and from the poor, came love and comfort and help. Each gave gladly according to his power.

But one stood apart watching all that was given. To the stricken woman he said:

"This you shall take, and this you shall reject. This you may have, but this you must put aside. Of these, such you may use, but the rest you shall cast away. All on which my mark is, that you may freely use to feed your people and to restore your city. All that bears not my mark is forbid to you, and woe to those who violate my rule!"

The woman looked on him, and saw that he was Union Labor. And she was only San Francisco.

UNION LABOR PROTESTS.

Doesn't Want the Hungry Fed With Flour That Is Boycotted.

MINNEAPOLIS, Minn., April 22.—George S. Howley, secretary of the Minneapolis Building Trades Council, yesterday protested to Secretary Wallace C. Nye of the public affairs committee of the Commercial Club against the sending of flour that had been boycotted by the local labor unions to feed the hungry at San Francisco. He declared that the purchase of that flour with relief subscriptions was an affront not only to the local laboring men but also to San Francisco, the strongest labor city in the union.

Howley did not say that he thought hungry victims of the earthquake and fire would refuse to eat bread made from the unfair brand of flour, but he intimated as much, mentioning the case of the strikers at Fall River, Mass., who refused to touch the interdicted product.

A. E. Kellington, general secretary of the International Union of Flour and Cereal Mill Employees, took the same stand as Howley. Both admitted that their attitude might be different were they sufferers. This evening they sought to keep their remarks out of the newspapers. The members of the relief committee were highly indignant at the statements of the labor leaders. One man pronounced their action "ghoulish."

Boycott on the flour was declared several years ago, after mill employees lost their contention in the arbitration of a strike. Ever since the labor unions have taken advantage of every opportuninty to prevent the sale or use of the interdicted brand.

Ten carloads of flour started to Frisco to-night. A local business man went with $50,000 for sufferers.

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